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In the Supreme Court of the United States

OCTOBER TERM, 1995

IN THE MATTER OF WABASH VALLEY POWER ASSOCIATION, INC.

THE UNITED STATES OF AMERICA, ON BEHALF OF THE RURAL ELECTRIFICATION ADMINISTRATION, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the courts below erred in creating an exception to the absolute priority rule, 11 U.S.C. 1129(b)(2)(B)(ii), to enable a debtor that utilizes a cooperative form of business organization to retain control of the enterprise over the objection of a class of senior creditors, whose claims for more than $ 670 million remain substantially unpaid.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court of appeals (including related entities) include the Rural Electrification Administration (now the Rural Utilities Service) of the United States Department of Agriculture, the Indiana Office of Utility Consumer Counselor, the State of Michigan, Wabash Valley Power Association, Inc., and the following rural electric membership cooperatives: Boone County Rural Electric Membership Corporation, Carroll County Rural Electric Membership Corporation, Fruit Belt Rural Electric Cooperative, Fulton County Rural Electric Membership Corporation, Hancock County Rural Electric Membership Corporation, Hendricks County Rural Electric Membership Corporation, Jasper County Rural Electric Membership Corporation, Jay County Rural Electric Membership Corporation, Kankakee Valley Rural Electric Membership Corporation, Kosciuski County Rural Electric Membership Corporation, LaGrange County Rural Electric Membership Corporation, Marshall County Rural Electric Membership Corporation, Miami-Cass County Rural Electric Membership Corporation, Newton County Rural Electric Membership Corporation, Noble County Rural Electric Membership Corporation, Parke County Rural Electric Membership Corporation, Paulding-Putnam Rural Electric Cooperative, Steuben County Rural Electric Membership Corporation, Tipmont Rural Electric Membership Corporation, United Rural Electric Membership Corporation, Wabash County Rural Electric Membership Corporation, Warren County Rural Electric Membership Corporation,

White County Rural Electric Membership Corporation, and Whitley County Rural Electric Membership Corporation.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Rural Electrification Administration, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The panel opinion of the court of appeals (App. 1a-42a) is reported at 72 F.3d 1305. The order of the court of appeals (App. 229a-230a) denying the petition for rehearing is unreported. The opinions of the district court (App. 43a-57a) and the bankruptcy court (App. 58a-228a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1995. A petition for rehearing was denied and the court's opinion amended on April 2, 1996. App. 229-230a. On June 28, 1996, Justice Stevens extended the time in which to file a petition for a writ of certiorari to and including August 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1129(b)(2)(B) of Title 11 provides, in pertinent part:

> For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> * * * * *
>
> (B) With respect to a class of unsecured claims —
>
> (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

STATEMENT

1. Wabash Valley Power Association, Inc. (Wabash) is a not-for-profit electric cooperative organized under Indiana law. Wabash generates and purchases electricity, which it sells to its members, 24 rural electric membership cooperatives (REMCs) in Indiana, Michigan, and Ohio.[1] Wabash is managed by a board of 24 directors consisting of a director nominated from each of its REMC members. The 24 REMCs thus own and control Wabash, as well as purchase all of its electricity. The cooperative arrangement for buying and generating electricity through Wabash enables the REMCs to obtain electricity for resale without paying the generator any margin of profit. Their customer-members, in turn, benefit from lower prices.

As part of a long-term strategy to serve its REMC customer-members, Wabash agreed in the 1970s to invest in the construction of the Marble Hill nuclear power plant. The Public Service Company of Indiana (PSI) undertook to build the plant, with Wabash purchasing a 17% stake in Marble Hill financed by $ 486 million in loans guaranteed by the Rural Electrification Administration (REA), an agency of the Department of Agriculture.[2] REA guaranteed a further $ 184 million in loans to Wabash for electrical substations, power lines, and a generating plant

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[1] Each REMC is also a cooperative, owned and managed by retail electricity customers.

[2] The Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 transferred REA's functions to the Rural Utilities Service (RUS). Pub. L. No. 103-354, Tit. II, § 232, 108 Stat. 3219. For consistency, we will refer to the agency as REA throughout the petition.

unrelated to Marble Hill. Wabash borrowed additional funds from the National Rural Utilities Cooperative Finance Corporation (CFC), a private entity that supplements REA's financing programs. As collateral, Wabash granted REA and CFC security interests in all of its tangible and intangible assets, including all of Wabash's interests in, and all revenues deriving from, certain long-term supply contracts between Wabash and each of the 24 REMCs. Those contracts, which were executed by the REMCs to induce REA to guarantee the loans, bind the 24 REMCs to purchase all of their electricity from Wabash for a period of 40 years. See *In re Wabash Valley Power Ass'n*, 114 B.R. 613, 616-620 (S.D. Ind. 1990); *National Rural Utils. Coop. Fin. Corp.* v. *Wabash Valley Power Ass'n*, 111 B.R. 752, 772-773 (S.D. Ind. 1980).

The Marble Hill project ran into difficulties and was cancelled by PSI in January, 1984. Wabash requested a rate increase to repay its Marble Hill debt. The Indiana Utility Regulatory Commission (IURC) denied that request because Marble Hill was not "used or useful" in the production of electricity. The Indiana courts affirmed the IURC's ruling. *National Rural Utils. Coop. Fin. Corp.* v. *Public Serv. Comm'n of Ind.*, 552 N.E.2d 23, 26, 29 (Ind. 1990).[3]

Unable to service the substantial debts arising from the failed Marble Hill project, Wabash filed a

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[3] REA's attempts to mandate a rate increase by means of federal preemption were also rejected by the courts. See *Wabash Valley Power Ass'n* v. *REA*, 903 F.2d 445 (7th Cir. 1990); *Wabash Valley Power Ass'n* v. *REA*, 988 F.2d 1480 (7th Cir. 1993).

petition under Chapter 11 of the Bankruptcy Code in May, 1985. It has operated ever since as a debtor-in-possession.

2. In 1990, Wabash proposed a Third Restated Fourth Amended Plan of Reorganization (Wabash Plan or Plan). Not counting post-petition interest (which exceeded $ 400 million), REA's claims at confirmation totalled approximately $ 670 million. The Wabash Plan would repay REA approximately $ 401.7 million of this debt. The Plan states that, upon confirmation, the interest of each REMC member in Wabash, if any,[4] "shall terminate." It further provides, however, that the current board of directors of Wabash—composed of nominees from each of the 24 member REMCs—will continue to control Wabash, and that Wabash's current officers will remain in place. The Plan was accepted by PSI and 21 of the 24 REMCs. It was rejected by REA and CFC, which hold more than 90% of the dollar value of claims against Wabash.[5] See 11 U.S.C. 1126(a).

3. REA argued in bankruptcy court that approval of the Wabash Plan was barred by the "absolute priority" rule codified in 11 U.S.C. 1129(b)(2)(B)(ii). That rule provides that junior claimants may not "receive or retain" "any property" "on account of" their claims if the claims of senior, dissenting creditors remain unsatisfied. The bankruptcy court rejected

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[4] The Plan states that, as members of a not-for-profit corporation, the REMCs "do not possess the usual indicia associated with an equity security holder." C.A. App. 210. See Ind. Code Ann. §§ 23-17-2-17, 23-17-2-18, 23-17-7-1 *et seq.* (Burns 1995).

[5] REA proposed an alternative plan, which was rejected by PSI and all 24 REMCs. That plan is no longer at issue.

that contention and adopted in their entirety findings of fact and conclusions of law proposed by Wabash. App. 181a-200a.

The bankruptcy court concluded that the absolute priority rule did not apply for three reasons. First, the court held that the REMCs' right to control Wabash after confirmation derived from their rights under the long-term supply contracts, which were necessary to provide a future income stream for creditors such as REA, rather than from their position as "equity holders." Consequently, the bankruptcy court held that the REMCs do not receive or retain any property "on account of" their interests in Wabash under the Plan. App. 187a-189a, 199a-200a. Second, the court concluded that the principal concern underlying the absolute priority rule—to prevent equity holders (who have an opportunity to profit from the post-confirmation operations of the reorganized debtor) from retaining their interests at the expense of unsecured creditors—did not apply, because a non-profit, cooperatively-owned entity such as Wabash simply "cannot make a profit for the Members [the REMCs] at the expense of creditors" after confirmation of the Plan. *Ibid.* Finally, the court concluded that the $ 3.2 million "new capital" contributed by the REMCs satisfied the "new value" exception to the absolute priority rule, which the court stated was a "viable" and "essential" part of bankruptcy practice. *Id.* at 189a-200a. The court also thought that the Wabash Plan conferred the "greatest economic benefit" to REA and CFC since no better offer for Wabash's assets had been presented and, under the Plan, REA and CFC would receive more than Wabash's fair market value as a "going concern." *Id.* at 181a-186a. Based on that reasoning,

the bankruptcy court permitted the Plan to be "crammed down" as "fair and equitable" over REA's and CFC's objections. *Id.* at 59a-60a.

4. The district court affirmed. App. 43a-57a. It agreed with the bankruptcy court that the REMCs' retention of control of Wabash under the Plan did not violate the absolute priority rule, because their continued control was required by the supply contracts and the Plan "provides that the members' interest in any property of Wabash is cut off." *Id.* at 53a. The court also agreed that the reasons underlying the rule did not apply here since it was not possible for Wabash, a regulated not-for-profit corporation, "to profit from its Chapter 11 experience in the classic profiting sense of being able to make money and keep it for itself to do with as it wishes." *Id.* at 55a. The district court did not discuss whether the REMCs' contribution of $ 3.2 million satisfied the "new value" exception to the absolute priority rule.

5. The court of appeals affirmed. App. 1a-42a. Distinguishing *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197 (1988), the court concluded that continued REMC control of Wabash did not violate the absolute priority rule because Wabash, as a cooperative entity, does not generate "[a] share of profits" for its member-REMCs, an attribute the court thought was "essential" to application of the rule. App. 28a-29a. "The potential for lower rates [accruing to the REMCs from their cooperative arrangement] is simply not an interest cognizable in bankruptcy," the court stated, and "[c]ontrol alone, divorced from any right to share in corporate profits or assets, does not amount to an equity interest." *Ibid.* The court did not view that result as unfair, because REA was familiar with Wabash's cooperative

structure when it agreed to guarantee the loans. *Id.* at 30a-31a. The court also believed it unlikely that *the government would recover more money under any* alternative plan. *Id.* at 31a-32a. In light of its ruling, the court stated that it had no need to resolve whether a "new value" exception to the absolute priority rule survived the enactment of the 1978 Bankruptcy Code. *Id.* at 18a-20a.

REASONS FOR GRANTING THE PETITION

The absolute priority rule codified at 11 U.S.C. 1129(b)(2)(B)(ii) assures creditors the right to be paid in full before interest holders receive or retain any property of the debtor. See *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197 (1988). By creating an exception to the absolute priority rule for not-for-profit cooperatives, the court of appeals contravened this Court's holding in *Ahlers* that no judge-made exceptions to the absolute priority rule survived Congress's enactment of the Bankruptcy Code in 1978 (with the possible exception of the new value exception that the *Ahlers* Court and the court below declined to reach). See 485 U.S. at 206.[6]

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[6] Although the court of appeals expressly stated that it was not applying the new value exception, it analyzed the relationships between the REMCs and Wabash in a manner that suggests such reasoning. See App. 28a. This Court has twice granted certiorari to decide whether a new value exception survived codification of the absolute priority rule in the 1978 Bankruptcy Code but both times has failed or been unable to reach the issue. See *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386 (1994) (bankruptcy issue not decided because of mootness); *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197 (1988) (deciding that the Court need not reach the new value exception issue on facts presented). To the extent that the present case raises issues concerning the

The bases on which the court of appeals rested its decision conflict with decisions of this Court, the Tenth Circuit, and bankruptcy courts, and find no support in the language of the Bankruptcy Code. First, contrary to the court of appeals' ruling, retention of control by the debtor is a sufficient "interest" in "property" to require application of the absolute priority rule. This Court has stated that, if the debtor retains an interest "only for purposes of control," *Ahlers*, 485 U.S. at 208, the absolute priority rule applies and the reorganization plan must provide full value to creditors' claims. Second, the court of appeals' conclusion that receipt of "a share of corporate profits or assets" by junior interests is "essential" for application of the absolute priority rule is inconsistent with the Code and with all but one court decision to address the issue. The court's conclusion gives inadequate weight to the fact that Wabash's REMC members derive significant economic benefits from avoiding the profit margin on electricity rates.

The court's departure from recognized bankruptcy principles in this case is particularly significant for the United States. REA currently has nine troubled cooperative borrower systems, structured in a manner similar to Wabash, with outstanding REA loans and loan guarantees exceeding $ 10 billion. The decision of the court of appeals threatens REA's ability to recoup significant sums loaned to those cooperatives. More generally, the court's decision creates a roadmap for cooperatives to avoid the absolute priority rule to the detriment of creditors.

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new value exception, we adhere to our position in *Ahlers* and *Bonner Mall* that the exception did not survive enactment of the 1978 Bankruptcy Code.

1.a. A plan of reorganization may be confirmed under the Bankrupcy Code only if: (1) every class of creditors is "not impaired"[7] under the plan; (2) every class of creditors has accepted the plan, 11 U.S.C. 1129(a)(8); or (3) the plan meets the requirements of Section 1129(b), which allows a plan to be imposed on an impaired, dissenting class of creditors if it is "fair and equitable." 11 U.S.C. 1129(b)(1). Since the interests of both REA and CFC are impaired under the Wabash Plan and neither has accepted the Plan, the Wabash Plan may not be confirmed unless it is "fair and equitable."

Section 1129(b) sets out the criteria that must be satisfied for a plan to be "fair and equitable" for these purposes. As relevant here, a plan is "fair and equitable" to a dissenting class of unsecured creditors only if each member of the class "receive[s] or retain[s] on account of [its] claim property of value, as of the effective date of the plan, equal to the allowed amount of such claim," *or*

> the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

11 U.S.C. 1129(b)(2)(B)(i) and (ii). That language codified the "absolute priority" rule. *Ahlers*, 485 U.S. at 202.[8] As paraphrased by the courts, "the absolute

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[7] A claim is "impaired" for purposes of the Code unless, *inter alia*, the plan leaves "unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." 11 U.S.C. 1124(a).

[8] The absolute priority rule had its genesis in the requirements of Chapter X of the former Bankruptcy Act of 1898 that a plan of reorganization could be confirmed only if it was "fair

priority rule 'provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property [under a reorganization plan].'" *Ibid.*, quoting *In re Ahlers*, 794 F.2d 388, 401 (8th Cir. 1986).

b. The principle underlying the absolute priority rule is that, when an enterprise is insolvent, all of its assets are properly treated as owned by its creditors. See Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. 857, 894 (1982) ("Reorganization proceedings provide nothing more than a method by which the sale of an enterprise as a going concern may be made to the creditors themselves."). As this Court noted in *Ahlers*, the structure of the Bankruptcy Code permits creditors to determine what future use is made of the assets of the enterprise and to evaluate whether they are "better off" by leaving the assets in the reorganized enterprise or by liquidation. *Ahlers*, 485 U.S. at 206-207.[9] When the rule is violated, and

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and equitable." See *Ahlers*, 485 U.S. at 202. In Justice Douglas' words, that phrase was intended to codify "the 'familiar rule' * * * that 'any arrangement of the parties by which the subordinate rights and interests of stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation.'" *Case* v. *Los Angeles Lumber Prod. Co.*, 308 U.S. 106, 116 (1939), quoting *Louisville Trust Co.* v. *Louisville, N.A. & C. Ry.*, 174 U.S. 674, 684 (1899).

[9] The court of appeals improperly speculated that the government would be better off under the Wabash Plan than under other alternatives. As this Court made clear in *Ahlers*, "the Code provides that it is up to the creditors—and not the courts—to accept or reject a reorganization plan which * * * fails to honor the absolute priority rule." *Ahlers*, 485 U.S. at 207. The determination whether creditors are "better off" if

creditors are forced to accept continued control and/or use of the assets by lesser interests, the result is unfair to creditors. See Henry J. Friendly, *Some Comments on the Corporate Reorganizations Act*, 48 Harv. L. Rev. 39, 77-78 (1934). By creating a new exception to the rule for debts owed by cooperative business entities, the court below has dramatically and improperly shifted the balance between debtor and creditor in bankruptcy proceedings concerning such entities.

c. Under the Wabash Plan, REA holds a substantial unsecured claim against Wabash that will not be satisfied in full,[10] yet the 24 member REMCs will remain in control of the reorganized debtor. The court of appeals upheld that result, because (in the court's view) the absolute priority rule applies only to enterprises that generate a "profit" in the conventional sense of a return on investment or a right to share in assets upon dissolution. See App. 28a-30a.[11]

d. That holding creates a new exception to the absolute priority rule in contravention to this Court's admonition in *Ahlers* that no new exceptions will be recognized to that rule under the 1978 Bankruptcy Code. In *Ahlers*, the Court granted certiorari to

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the plan is confirmed "is for the creditors to make in the manner specified by the Code" and "courts applying the Code must effectuate their decision." *Ibid.*

[10] Thus, the first clause of Section 1129(b)(2)(B) is inapplicable to this case.

[11] The court also reasoned, App. 30a-31a, that continued REMC control of Wabash was not unfair because REA was familiar with Wabash's structure at the time it guaranteed these loans. REA, however, cannot be charged with anticipating the court of appeals' departure from the absolute priority rule.

decide whether an exception existed to the absolute priority rule for "new value" contributed by the debtor. Courts had interpreted this Court's decision in *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939), to recognize such an exception. Although it ultimately reserved judgment on whether the "new value" exception of *Case* survived the enactment of the Code, see 485 U.S. at 203-204 n.3, the *Ahlers* Court unanimously rejected the suggestion that there are any *other* exceptions to the rule. The respondents in *Ahlers* had urged the Court to find a "broader exception" to the rule in that case, even though the *Case* exception was inapplicable. Canvassing the legislative history of the Bankruptcy Code, this Court concluded that "no such broader exception exists":

> We think the statutory language and the legislative history of § 1129(b) clearly bar *any* expansion of *any* exception to the absolute priority rule beyond that recognized in our cases at the time Congress enacted the 1978 Bankruptcy Code.

485 U.S. at 205-206 (emphasis added).[12] We know of no case before enactment of the Bankruptcy Code in 1978 that created an exception to the absolute priority rule of the type recognized by the court of appeals in this case.[13]

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[12] The Court in *Ahlers* reserved judgment on whether the "new value" exception to the absolute priority rule of *Case* survived enactment of the Code, see 485 U.S. at 203 n.3.

[13] See *In re Stegall*, 85 B.R. 510, 513 (C.D. Ill. 1987) (noting that "courts have recognized one exception to the absolute priority rule through which an individual owner may retain an interest in the debtor estate," the new value exception), aff'd, 865 F.2d 140 (7th Cir. 1989). See also 6A *Collier on Bankruptcy*

2. In creating an exception to the absolute priority rule for businesses owned in a cooperative arrangement, the court of appeals' reasoning conflicts with the statute and applicable case law in at least two ways.

a. The court of appeals held that "[c]ontrol alone, divorced from any right to share in corporate profits or assets, does not amount to an equity interest." App. 29a. That ruling conflicts both with this Court's decision in *Ahlers* and the Tenth Circuit's analysis of "interest" in *Unruh* v. *Rushville State Bank*, 987 F.2d 1506 (1993).

In *Ahlers*, this Court held that retained control over an enterprise is sufficient to create an "interest" under the absolute priority rule. As the Court noted, even "where 'going concern' value may be minimal, there may still be some value in the control of the enterprise." 485 U.S. at 208. *Ahlers* did not apply the absolute priority rule in a novel way; the Court derived support for its ruling from a 1913 decision of this Court: "Whether the value is 'present or prospective, for dividends *or only for purposes of control*' a retained equity interest is a property interest to 'which creditors [are] entitled . . . before the stockholders [can] retain it for any purpose whatever.'" *Ibid.* (emphasis added), quoting *Northern Pacific Ry.* v. *Boyd*, 228 U.S. 482, 508 (1913). As the *Ahlers* Court concluded, "we think that the interest [debtors] would retain under any reorganization must be considered 'property' under § 1129(b)(2)(B)(ii), and therefore can only be retained pursuant to a plan

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¶ 11.06 (14th ed. 1977) (canvassing cases under pre-Code absolute priority rule).

accepted by their creditors or formulated in compliance with the absolute priority rule." 485 U.S. at 209.

In *Unruh*, the debtors operated farms as sole proprietorships. Under their plan of reorganization, they sought to retain managerial control over the farms, which had negligible value as going concerns. The debtors argued that the absolute priority rule did not operate to deny them control over their land since its minuscule value did not constitute an "interest" in "property" for purposes of 11 U.S.C. 1129(b)(2)(B)(ii). The Tenth Circuit rejected that argument. The court emphasized that, because the debtors were "retaining control of their farms and the rights to future profits," they were "receiving property within the meaning of the rule." 987 F.2d at 1509 (citing *Ahlers*, 485 U.S. at 207-208).[14]

b. The court of appeals' conclusion that the absolute priority rule is inapplicable to cooperative commercial entities proceeds from its erroneous assumption that the rules of bankruptcy distribution are only concerned with property "interests" that result in a "profit" in the conventional sense of a return on investment or a right to share in assets upon dissolution. The court held that the interest of Wabash's members in their cooperative, giving them the benefit of lower prices, "is simply not * * * cognizable in bankruptcy." See App. 15a-17a, 28a-30a.[15]

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[14] Although the *Unruh* court accepted that, as an economic entity, the farm had "no value," it appeared to recognize that control over the farm gave the debtor the opportunity for future economic benefits. In that respect as well, the Tenth Circuit's approach differs from that of the court below. See 987 F.2d at 1509.

[15] Both the bankruptcy court and the district court expressed similar sentiments. See App. 187a-189a, 200a, 55a.

Nothing in the language of the Code supports the court of appeals' distinction between profit-making and cooperative commercial enterprises for purposes of the absolute priority rule.[16] The Code's statement of the rule is unequivocal: A plan is "fair and equitable" to unsecured creditors *only* if "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property." 11 U.S.C. 1129(b)(2)(B)(ii).[17] This language

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[16] A "debtor" for purposes of Chapter 11 must be a "person," which includes "corporation[s]." 11 U.S.C. 101(13) and (41), 109(d). A corporation is defined to include associations having the power or privileges of private corporations and unincorporated companies or associations. 11 U.S.C. 101(9). This definition was intended to encompass entities covered under the old Bankruptcy Act. H.R. Rep. No. 595, 95th Cong., 1st Sess. 309-310 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 22-23 (1978). See *In re Allen University*, 497 F.2d 346 (4th Cir. 1974) (non-profit institution can be a voluntary bankrupt under Chapter X of the former Bankruptcy Act).

[17] Although we think the language is clear and resort to legislative history is unnecessary, see *Toibb* v. *Radloff*, 501 U.S. at 162, nothing in that history suggests special treatment for cooperative entities in bankruptcy. The House Report explains that Section 1129(b)(2)(B)(ii) was intended to "codif[y] the absolute priority rule from the dissenting class on down" and goes on to recite the rule without suggesting any exceptions or qualifications:

> The general principle of the subsection permits confirmation notwithstanding non-acceptance by an impaired class if that class and all below it in priority are treated according to the absolute priority rule. The dissenting class must be paid in full before any junior class may share under the plan.

H.R. Rep. No. 595, *supra*, at 413. Other legislative history suggests a similarly broad, unqualified rule. See 124 Cong.

provides no basis for distinguishing between profit-making and cooperative business enterprises.[18]

The court of appeals' creation of an exception to the absolute priority rule for entities such as Wabash is unsupported by the case law, which almost universally subjects not-for-profit entities to the same requirements for confirmation under Section 1129(b) as profit-making enterprises. See, *e.g.*, *In re S.A.B.T.C. Townhouse Ass'n*, 152 B.R. 1005 (Bankr. M.D. Fla. 1993) (absolute priority rule applicable to nonprofit homeowners association); *In re E. Maine Elec. Coop.*, 125 B.R. 329 (Bankr. D. Me. 1991) (rule applicable to not-for-profit electric cooperative); *In re Mandalay Shores Coop. Housing Ass'n*, 53 B.R. 609 (Bankr. M.D. Fla. 1985) (rule applicable to nonprofit cooperative association). But see *In re Whittaker Memorial Hosp. Ass'n*, 149 B.R. 812 (Bankr. E.D. Va.

Rec. 32,408 (1978) (Rep. Edwards) ("the plan may be confirmed if the impaired class of unsecured claims receives less than 100 cents on the dollar (or nothing at all) as long as no class junior to the dissenting class receives anything at all"). See also H.R. Doc. No. 137, 93d Cong., 1st Sess. Pt. 1, at 258-259 (1973).

[18] Other provisions of the Code support this reading. Congress provided in the Code that a bankruptcy case may not be converted from a reorganization to a liquidation if the debtor is "a corporation that is not a moneyed, business, or commercial corporation." 11 U.S.C. 1112(c). Congress thus provided special rules for not-for-profit entities in bankruptcy in specific instances. Its failure to do so here strongly suggests that no such exception was intended. See, *e.g.*, *City of Chicago* v. *Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994) ("'[I]t is generally presumed that Congress acts intentionally and purposely' when it 'includes particular language in one section of a statute but omits it in another.'"); *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (same).

1993) (rule inapplicable to nonstock membership hospital corporation).

There is no sound basis for creating an exception to the absolute priority rule for cooperative commercial entities. A cooperative electric utility company seeks to obtain lower prices for its members by eliminating costs associated with the generators' "profit" or "return on equity." See App. 15a-17a. That does not mean that the members lack economic self-interest or that the financial benefits accruing to the cooperative's membership are "not an interest cognizable in bankruptcy," as the court of appeals held. *Id.* at 28a. Just as with for-profit corporations and partnerships, cooperatives are economic institutions whose "primary objective * * * is not charitable." Israel Packel, *The Organization and Operation of Cooperatives* 7 (A.L.I. 1970). "In the normal case * * * the cooperative is designed to further the economic welfare of its members." *Ibid.* The court below acknowledged the valuable economic benefits flowing to Wabash's members under the Plan, but rationalized the nonpayment of REA debts as follows:

> The absolute priority rule is an aspect of the requirement that a plan be "fair and equitable." There is some appearance of unfairness in the Wabash Plan. Wabash's member distribution cooperatives, whose representatives approved the Marble Hill fiasco, emerge from bankruptcy in the driver's seat, still paying low rates, and still not paying off the REA debt. *This outcome, however, is justified, even dictated, by Wabash's cooperative structure. The Members, by controlling Wabash, control their own rates, making it possible*

> *for them to be served under the 40-year requirements contracts, which are, in turn, Wabash's most valuable possession.*

App. 27a (emphasis added).

Moreover, nothing in state law would prevent a cooperative, after avoiding its debt to the United States through the lower courts' creation of a cooperative enterprise exception to the absolute priority rule, from emerging from bankruptcy and converting into a for-profit entity. See, *e.g.*, Ind. Code Ann. § 23-17-19-1 (Burns 1995) (permitting not-for-profit entity to merge with business corporation). There is no justification for applying the absolute priority rule differently with regard to two essentially fungible forms of doing business.

3. The court of appeals' departure from recognized bankruptcy principles in this case is particularly significant for the United States because electric utility cooperatives constitute the vast majority of the entities to which REA extends loans under its program to assist in the provision of rural electric power. *E.g.*, *In re E. Maine Elec. Coop.*, 125 B.R. 329 (Bankr. D. Maine 1991). The decision of the court of appeals provides a roadmap for these entities to abandon their debt to the United States, while remaining in control of and retaining all of the economic benefits of their enterprises. REA currently has nine troubled cooperative borrower systems with outstanding REA loans and loan guarantees exceeding $ 10 billion.

The court of appeals' ruling also poses a significant threat, beyond the circumstances of REA loans to troubled electric cooperatives, to the legitimate interests and expectations of creditors. The grava-

men of the court of appeals' holding is that a cooperative entity can retain control over its future activities and enjoy the benefits of its operations without being wholly accountable to creditors through application of the absolute priority rule. That ruling may be invoked by entities previously thought to have been included within the ambit of the absolute priority rule, such as cooperative housing associations, *e.g.*, *In re Mandalay Shores Coop. Housing Ass'n*, 53 B.R. 609 (Bankr. M.D. Fla. 1985) (applying absolute priority rule); homeowners' associations, *e.g.*, *In re S.A.B.T.C. Townhouse Ass'n*, 152 B.R. 1005 (Bankr. M.D. Fla. 1993) (same); and nonprofit hospital associations that own and control hospitals, but see, *e.g.*, *In re Whittaker Memorial Hosp. Ass'n*, 149 B.R. 812 (Bankr. E.D. Va. 1993) (creating exception to absolute priority rule).

Other nonprofit entities, such as nursing homes, insurance companies, associations of condominium owners, trusts to pay health care expenses, and associations to manage low-income housing, could also conceivably invoke the exception recognized by the court of appeals.[19] There is no logical basis for distinguishing any of these economic entities from those normally subject to application of the absolute priority rule, especially when the entities are

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[19] All of these types of not-for-profit entities have sought protection under the Bankruptcy Code. See, *e.g.*, *In re Lummus Indus., Inc.*, 193 B.R. 615 (Bankr. M.D. Ga. 1996); *In re Lincoln Avenue & Crawford's Home for the Aged, Inc.*, 164 B.R. 600 (Bankr. S.D. Ohio 1994); *In re 560 Ocean Club, L.P.*, 133 B.R. 310 (Bankr. D.N.J. 1991); *In re Westchester County Civil Serv. Employees Ass'n*, 111 B.R. 451 (Bankr. S.D.N.Y. 1990); *In re Two-KMF Dev. Ass'n*, 63 B.R. 149 (Bankr. N.D. Ill. 1985).

organized to advance economic, if not strictly "profit"-making, interests. The rights of creditors to the important protection of the absolute priority rule should not turn on the form of business organization chosen by the debtor.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

IN THE MATTER OF WABASH VALLEY POWER ASSOCIATION, INC.

THE UNITED STATES OF AMERICA, ON BEHALF OF THE RURAL ELECTRIFICATION ADMINISTRATION, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 94-3086, 94-3087, 94-3088 and 94-3095

IN THE MATTER OF WABASH VALLEY POWER ASSOCIATION, INCORPORATED, DEBTOR-APPELLEE.

APPEAL OF UNITED STATES OF AMERICA, ON BEHALF OF THE RURAL ELECTRIFICATION ADMINISTRATION

[Mar. 20, 1996]

AS AMENDED ON DENIAL OF REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before: CUDAHY, COFFEY and MANION, Circuit Judges.

CUDAHY, Circuit Judge.

This case had its origins in the cancellation of a partially completed nuclear power plant—the Marble Hill project in Jefferson County, Indiana. The Marble Hill project was undertaken by Public Service Company of Indiana (now PSI Energy, Inc.) (PSI). Wabash Valley Power Cooperative (Wabash), a generation-and-transmission cooperative serving 24 rural

electric membership cooperatives (Members or distribution co-ops) purchased a 17% interest in the project. It borrowed the funds for this purpose with the aid of a loan guarantee from the Rural Electrification Administration (REA). After an expenditure of $2.9 billion, PSI decided to cancel the Marble Hill project in 1984. At that time, Wabash had invested $460 million in the defunct plant. Upon the cancellation, Wabash filed suit against PSI (83% owner of Marble Hill) and the architect-engineer of the project, Sargent and Lundy Engineers (S & L).

At that point the problem was similar to that presented elsewhere by other nuclear plant abandonments or cost overruns. Who pays: the stockholders of an investor-owned utility, the ratepayers of almost any utility or, if there is very little or no equity (as may be the case with a cooperative utility), the secured and unsecured creditors? For example, in the case of the extremely costly Seabrook Plant, jointly owned by Public Service Company of New Hampshire, the stockholders and ratepayers shared the burden of the company's bankruptcy. The company obtained a rate increase covering only a fraction of the Seabrook Plant's cost overruns. *In re Public Serv. Co.*, 114 B.R. 820 (Bankr.D.N.H.1990). In the case of the Shoreham Plant on Long Island (owned by the Long Island Lighting Company), the ratepayers apparently contributed something by way of a series of rate increases to keep the company out of bankruptcy when the plant was decommissioned. *Citizens for an Orderly Energy Policy, Inc. v. Cuomo*, 159 A.D.2d 141, 559 N.Y.S.2d 381 (1990), *aff'd* 78 N.Y.2d 398, 576 N.Y.S.2d 185, 582 N.E.2d 568 (1991). In the Duquesne Light Company case, the Pennsylvania Commission allowed amortization over a ten-year period of the

sunk costs of certain abandoned nuclear plants, but the Pennsylvania Supreme Court reversed on the grounds that the plants were never used and useful in the public service. *Barasch v. Pennsylvania Public Util. Comm'n*, 516 Pa. 142, 532 A.2d 325 (1987), *aff'd sub nom. Duquesne Light Co v. Barasch*, 488 U.S. 299, 109 S.Ct. 609, 102 L.Ed.2d 646 (1989). The utility company then appealed to the United States Supreme Court, claiming confiscation, but the Court affirmed, primarily on the ground that the same impact on allowable revenue could have been achieved by a small adjustment in the allowed rate of return on equity. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 109 S.Ct. 609, 102 L.Ed.2d 646 (1989). Following the principle established in *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944), the Court held that the particular route followed in the ratemaking process did not raise constitutional problems so long as the "end result" was fair. Thus, commissions and courts have followed differing paths in accounting for defunct or high-cost nuclear plants.

In the present case, at the time of the Marble Hill cancellation Wabash attempted to restructure its REA indebtedness and; at REA's insistence, filed for a 51% electric rate increase before the Indiana Utility Regulatory Commission (the IURC) (formerly the Public Service Commission of Indiana). This rate hike was denied based on *Citizens Action Coalition, Inc. v. Northern Indiana Public Service Co. (NIPSCO)*, 485 N.E.2d 610 (Ind.1985), *cert. denied*, 476 U.S. 1137, 106 S.Ct. 2239, 90 L.Ed.2d 687 (1986) which had denied a similar increase to NIPSCO on the grounds that a canceled plant was not "used and useful" in the public service. *In re Wabash Valley*

Power Ass'n, Inc., Cause No. 37472, 1987 WL 257474, 1987 Ind. PUC LEXIS 415 (Ind. Pub. Serv. Comm'n 1987). On appeal, the Indiana Supreme Court reaffirmed the principles enunciated in its NIPSCO decision, denying the rate increase on the ground that Marble Hill had never become used and useful in the public service. *National Rural Utils. Coop. Fin. Corp. v. Public Serv. Comm'n*, 552 N.E.2d 23 (Ind. 1990).

Cut off from relief at the hands of Indiana regulators and courts, REA sought to preempt state law and to take the rate increase decision into its own hands. It tried to do this first by a letter directed to Wabash and later by a notice-and-comment rulemaking. These efforts at preemption were rejected by this court, in its decisions in *Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 903 F.2d 445, 452-54 (7th Cir.1990) (*Wabash I*) and *Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 988 F.2d 1480, 1488-91 (7th Cir.1993) (*Wabash II*), respectively. It is important to an understanding of the difficult bankruptcy questions involved here that all the efforts of REA to recoup its defaulted loan through a Wabash rate increase have failed and that there appears to be no further recourse in this direction, except arguably for a 4% "viability" increase to finance the reorganization plan approved by the bankruptcy court here.

In this connection, we note that Wabash has 22 Member distribution cooperatives in Indiana, organized as not-for-profit corporations, pursuant to the Indiana Rural Electric Membership Corporation Act, Ind.Code §§ 8-1-13-1 *et seq.* (1995). Wabash itself was formed under the Indiana Not-For-Profit Corporation Act, Ind.Code §§ 23-7-1-1 *et seq.* (repealed 1971, similar

provisions now at §§ 23-17-1-1 *et seq.*). As a not-for-profit corporation Wabash cannot pay any earnings or dividends to its members, and upon dissolution any assets remaining after payment of debts escheat to the state. Ind.Code § 23-17-30-1 (1995). Wabash also has one Member cooperative in Michigan and one in Ohio. Each Member is owned and controlled by its customers, retail buyers of electricity. Wabash was formed in 1962 to provide its Members with a reliable and reasonably priced wholesale power supply. Wabash is governed by a Board consisting of one director from each of its 24 Members. Before Wabash began supplying its Members with electric power, the Members received power directly from one of four adjacent investor-owned utilities—PSI, Northern Indiana Public Service Company (NIPSCO), Indianapolis Power and Light Company (IPL) and Indiana & Michigan Electric Company (I & M) (the IOUs).

In 1977, Wabash entered into 40-year wholesale power requirements contracts with its Members (the Supply Contracts) and subsequently took an assignment of the Members' existing power supply contracts with the adjacent IOU's. The Supply Contracts provide that (1) Wabash's rates shall produce revenues sufficient, but no more than sufficient, to pay operating expenses, taxes, etc., and to provide reasonable reserves; (2) rates must be pre-approved by the Wabash Board (which represents the Members); and (3) all rate requests are "subject to the approval" of the Indiana Commission.[1] The IURC requires any

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[1] The rates charged by Wabash to one of its Member cooperatives (Fruit Belt) are regulated by the Michigan Public Service Commission. A Settlement Agreement with respect to

excess of Wabash's revenues over its expenses and replacements to be credited to its Members.

As noted, efforts to restructure the REA indebtedness following the cancellation of Marble Hill were unsuccessful, and in 1985 the United States Department of Justice asserted the possibility of personal liability of the Wabash directors. Shortly thereafter, Wabash filed under Chapter 11 of the Bankruptcy Code. As of the bankruptcy Petition Date, Wabash owed REA approximately $130 million related to non-Marble Hill assets and about $540 million related to Marble Hill for a total of $669,058,454.25 in principal and interest.

Subsequent to the Petition Date, Wabash voluntarily paid REA $36,444,964.22 in non-Marble Hill debt service payments. After June of 1988 Wabash made these debt service payments into an escrow account entitled the *Timbers* Account. In 1990, pursuant to an order of the bankruptcy court, Wabash paid REA an additional $28,928,693.22 from the *Timbers* Account. *Order Granting United States' Motion for Abandonment of Monies in Escrow Account.* Bankr.Rec.Doc. 6 (hereinafter *Timbers* Order). As of the Petition Date, Wabash also owed about $35 million to the National Rural Utilities Cooperative Finance Corporation (CFC), of which about $12 million has been paid. The REA debt and most of the CFC debt are secured by a pre-petition joint mortgage and security agreement (REA mortgage) covering most of Wabash's assets. PSI has also filed certain unsecured claims against Wabash, most of them related to Marble Hill.

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rate design between Wabash, Fruit Belt and the staff of the Michigan Commission was entered into on September 4, 1991.

A settlement has been reached between Wabash and PSI, *contingent upon confirmation of the Wabash Plan* (or some other consensual resolution of the bankruptcy case) (the PSI Settlement). That settlement provides, *inter alia*, for payments by PSI to REA and to CFC having a present value of $170 million. The PSI Settlement also provides that any plan filed by Wabash shall allow PSI's "indemnification" claim in the amount of $466,017.00 and that PSI will forego payment of its remaining claims. The bankruptcy court found, there being no dispute, that the PSI Settlement was fair and reasonable, and that the payments worth $170 million were contingent on confirmation of the Wabash Plan. A settlement with S & L, to which REA did not object, was also found to be fair and reasonable.

In order to reach an appropriate disposition of the bankruptcy proceeding, the bankruptcy court determined the value of Wabash, both as a going concern and upon liquidation, and evaluated the claims of the secured and unsecured creditors. The court also considered reorganization proposals submitted by both Wabash and REA.

Initially, after a hearing, the bankruptcy court undertook to determine Wabash's going-concern value. Its decision on this point was, however, remanded by the district court for the taking of further evidence on the prospects of a rate increase for Wabash and also on the question whether such an increase would invalidate the Supply Contracts. *National Rural Utils. Coop. Fin. Corp. v. Wabash Valley Power Ass'n, Inc.*, 111 B.R. 752 (S.D.Ind.1990), *rev'g and rem'g* 77 B.R. 991 (Bankr.S.D.Ind.1987). Further hearings were held on these issues as well as

on the appropriateness of the reorganization plan proposed by REA and the one submitted by Wabash.

The REA Plan was rejected *inter alia* because it required substantial rate increases—not realistically to be anticipated. *In re Wabash Valley Power Ass'n, Findings of Fact and Conclusions of Law on Confirmation of Debtor's Third Restated Fourth Amended Plan of Reorganization and Denying Confirmation of REA's Plan*, No. 85-2238-RWV-11, slip op. at 145-73 (Bankr.S.D.Ind. August 7, 1991) (hereinafter *Bktcy.Op.*). The REA Plan provided for full payment (including post-petition and post-confirmation interest) to REA and to CFC over a 37-year period. REA estimated that the debt to it and to CFC totaled $1 billion. Under the REA Plan, REA and CFC were to take control of Wabash and elect its Board of Directors. As discussed *infra*, this action would presumably breach the Supply Contracts and render them unenforceable. The REA Plan also provided that Wabash might be liquidated at any time, at the discretion of the REA. The bankruptcy court held that the REA Plan violated 11 U.S.C. § 365 because it provided for the partial assumption of the Supply Contracts without giving effect to their express provision recognizing rate regulation by the IURC and without honoring their implied provision requiring Member control of the Wabash Board. Under 11 U.S.C. § 365, an entire contract must be assumed including any burdensome provisions that it may have. *See In re Chicago, R.I. & P. Ry. Co.*, 860 F.2d 267, 272 (7th Cir. 1988). In addition, the REA Plan purported to adopt the PSI Settlement, even though that Settlement was contingent on confirmation of the Wabash Plan. REA has not appealed the rejection of its Plan.

The Wabash Plan, *Wabash Valley Power Ass'n, Inc.'s Third Restated Fourth Amended Plan of Reorganization*, Bankr.Rec.Doc. 154, has been approved by both the bankruptcy court, *Bktcy.Op.* at 112-45, and the district court, *In re Wabash Valley Power Ass'n*, No. IP 91-928-C (S.D. Ind. June 28, 1994) (hereinafter *Dist.Op.*), and is the subject of this appeal by REA. The approval was based primarily on the bankruptcy court's findings of fact regarding Wabash's value in various circumstances. *Bktcy.Op.* at 16-101.

The stipulated liquidation value of Wabash's tangible, useful assets is $175 million and of its Marble Hill assets is $29.8 million. The bankruptcy court properly found that the liquidation value of the PSI Settlement was zero because of its contingent nature and its assumption that Wabash would continue to buy power from PSI in the future. The S & L Settlement was also properly found to have zero liquidation value. The bankruptcy court found that the Supply Contracts, under which the Members took power from Wabash, had no value in liquidation. This finding was based in part on the testimony of law professor, Ian MacNeil, that, other than the right to fully-earned payments, Wabash's rights under these contracts were not assignable nor were Wabash's principal duties delegable. There is thus substantial evidence in the record that the Supply Contracts have no fair market value if Wabash is liquidated. The finding of the bankruptcy court that the total liquidation value of Wabash (valuing the PSI and S & L Settlements, the Supply Contracts and other contract rights at zero) amounts to $213,210,000 is not clearly erroneous. Even giving full value to the PSI and S & L Settlements (a procedure rejected by the bankruptcy

court) the total value recoverable by a Wabash trustee on liquidation would be less than $400 million.

The bankruptcy court also determined Wabash's fair market value as a going concern and thereby fixed the amount of the secured claim held by REA and CFC. Based primarily on Professor MacNeil's testimony, the bankruptcy court determined that the Supply Contracts would be breached and rendered unenforceable by Wabash if regulatory authority were transferred from the IURC, if the Members lost control over Wabash or if rates in excess of Wabash's costs were charged. The Contracts themselves provide that the seller of the electricity may not make a profit. They expressly provide that only Wabash's Board (comprised, according to its Bylaws, of Member representatives) may request a rate change and all rate changes are subject to IURC approval. IURC regulations in turn provide that any excess of revenues over expenses and over a limited reserve must be credited against fuel adjustment charges.

Any transfer of control of Wabash away from the Members would thus nullify their purchase obligation under the Supply Contracts. Once discharged from their purchase obligation under the Supply Contracts, the Members would be free to take their business elsewhere if rates were raised to a profit-creating level. The Members would be especially inclined to depart since they presently maintain physical connections with the very investor-owned utilities from which Wabash purchases power.[2]

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[2] Although not developed in the record below, we can take judicial notice that a trend toward competition is running strong in the electric utility industry—which at some point may make it even more difficult to maintain substantial rate

Assuming inability to obtain a rate increase and a need to renegotiate the Supply Contracts in the context of easy access to competitive power from the four adjacent IOUs, Wabash presented testimony as to its going-concern value based on sale to a profit-motivated IOU with the existing customer base of 24 distribution co-ops. The bankruptcy court found that any benefits that an investor-owned utility could realize from acquiring Wabash would be tightly constrained by the need to renegotiate the Supply Contracts.[3] It also found that no prospective buyers had actually appeared (except PSI and the terms of its offer were not disclosed by REA). Further, there was little prospect of another not-for-profit cooperative seeking to buy Wabash since no such entity could realize an economic benefit from doing so. The testimony, using a cash flow approach and a 10.2% discount rate arrived at a going-concern valuation,

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differentials between utilities in adjoining service territories. *See, e.g.*, Peter Passell, *A Makeover for Electric Utilities: Power Industry, Facing Competition, Struggles With Change*, N.Y. Times, Feb. 3, 1995 at D1; Irwin Stelzer, *Restructuring the Electric Utility Industry: Further Tentative Thoughts*, 7 Electricity Journal 36 (Oct. 1994).

[3] Because Wabash's generation of electricity is relatively meager, it serves primarily as a bulk purchasing agent for its Members. The Members presumably bear the expense of coordinating their purchasing efforts through Wabash only because they can reap the benefits of potentially lower rates. Even if the necessary rate increases could have been obtained, the Members would be unlikely to renegotiate the Supply Contracts with a "for profit Wabash" on any basis allowing more ample recovery by REA. A far likelier scenario, if the Supply Contracts were breached, would have Wabash's member cooperatives simply returning to the practice of direct purchases from the adjacent investor-owned utilities.

and fair market value, of $190,000,000. This value produced a market-to-book ratio that was consistent with ratios of stock value to asset book values of comparable electric utilities. The bankruptcy court found $190 million to be a maximum going-concern and fair market value and that finding is not clearly erroneous.

The value of Wabash to *its Members* exceeds its value to any third-party buyer because Wabash is tailored exactly to the Members' requirements. Dr. Wilbur G. Lewellen testified with respect to the total value of Wabash to its Members based on cost savings they realize in buying Wabash power as opposed to direct purchases from the adjacent IOUs. The measurement of the cost savings to the Members of using Wabash involved a study of power costs with and without Wabash. Lewellen used a 13% discount rate as applied to cost savings of $69.4 million and added the debt associated with Wabash's operating assets to reach a total value to the Members of $221.7 million. The bankruptcy court accepted this testimony and this finding is not clearly erroneous.

According to the bankruptcy court, the $190 million going-concern value represents the amount the secured creditors could expect to receive following a sale of Wabash to a third party as a going concern and satisfies the requirements of 11 U.S.C. § 506(a) and § 1129(b)(2)(A). Using this going-concern value of $190 million, and adding the PSI Settlement of $170 million, the S & L Settlement of $15 million, Marble Hill assets, investment accounts, CFC investments and vehicles, the bankruptcy court arrived at a total value of Wabash's assets for purposes of 11 U.S.C. § 506(a) and § 1129(b) of approximately $431.9 million. Based on this value, REA and CFC were found to be

undersecured, with the secured portion of REA's claim valued at approximately $400 million.

The bankruptcy court found that the value to the Members of $221.7 million was also relevant to the confirmability of the plan because it defined the maximum amount which could possibly be made available to creditors. The Wabash Plan provides for a "viability" rate increase (enabling a reorganization plan to be approved) from the IURC based on this value to the Members. This rate increase will allow Wabash to satisfy a fraction of the unsecured claims, assuring that creditors are receiving the maximum amount possible for purposes of 11 U.S.C. § 1129(b)(2)(B). The bankruptcy court found it reasonable (because of benefit to ratepayers) to expect that the IURC would approve a "viability" rate increase to Wabash. This would enable Wabash to pay $221.7 million to REA and CFC and thereby come out of bankruptcy. Under the Wabash Plan, based on Wabash's value to its Members, REA is to receive a total of $430,639,122.00 (including funds from the PSI and S & L Settlements) in addition to the $36.4 million that Wabash voluntarily paid REA after the Petition Date. CFC is to receive $26,207,506.00 in addition to the $12 million that Wabash voluntarily paid CFC subsequent to the Petition Date. PSI is to receive $466,017.00 payable in equal installments over five years without interest. The Members' unsecured claims for patronage capital (totaling $7,184,740.07) are to be reduced to the same extent that the unsecured portions of the claims of REA and CFC are not honored.

The Wabash Plan also provides that Members are to make capital contributions to Wabash of $3,213,346.00 payable in cash or through rates over 12 months.

This sum is intended to form a part of the amount allowed as a capital reserve in Wabash's 1983 rate case. Article IX of the Wabash Plan contains the essential provision that Wabash is to assume the Supply Contracts with its Members in order to generate the revenues necessary to fund the Plan. This assumption will obligate the Members to fulfill all their obligations under the Contracts and will entitle them to all the benefits of the Contracts including the right to name Wabash's Board of Directors. REA and CFC voted to reject the Wabash Plan. PSI, also an impaired creditor, and almost all the Members voted to accept it.

The bankruptcy court found that the Wabash Plan provided the maximum amount that REA and CFC could possibly obtain. It met the requirements of 11 U.S.C. § 1129(b) and was confirmable. All objections to the Wabash Plan were denied and the Wabash Plan was confirmed.

On appeal, REA raises numerous objections to the Wabash Plan. Because the Plan is being affirmed over REA's objection it must satisfy the requirements for "cramdown." "Cramdown" is the procedure for approving a reorganization plan in the face of creditor resistance. It requires that at least one class of impaired creditors approve the plan and that the plan satisfy the absolute priority rule, which precludes the payment of junior claims as long as senior claims remain unsatisfied. REA contends on appeal that the Wabash Plan fails to meet these requirements. It also argues that the valuation performed by the bankruptcy court underestimates the value of REA's secured claim in two respects: first, it offsets the money paid into the *Timbers* Account against REA's secured claim, and second, it values the security

interest at the going-concern value rather than at the "value to the Members." We address these issues below, and find, although some close questions are presented, that the Wabash Plan was properly upheld by the district court.

ABSOLUTE PRIORITY RULE

The most significant obstacle to confirmation of the Wabash Plan is the question of its compliance with the "absolute priority rule." As codified for the first time in the Bankruptcy Code, the rule provides that, in order for a bankruptcy plan to be approved in the face of the refusal of an unsecured creditor to accept it (a "cramdown"), the holder of any claim or interest junior to that of the dissenter may not "receive or retain under the plan on account of such junior claim or interest any property." 11 U.S.C. § 1129(b)(2)(B)(ii).

The rule thus stated has three components: (1) the identification of junior claims or interests; (2) the identification of any property retained by the holders of such claims or interests; and (3) the determination whether the property is retained "on account of" a junior claim or interest. The term "interest" in this context means equity interest. *See, e.g., 5 Collier on Bankruptcy*, § 1122.03[3] (15th ed. 1994). ("A plan of reorganization must separately classify nonpriority prepetition unsecured claims, priority claims, secured claims, including secured setoff claims, and equity interests.").

The difficulty in resolving the absolute priority problem in the case before us primarily reflects the unusual structure of the entities involved. Not one of the players in this drama is typecast. The corporation undergoing bankruptcy is a not-for-profit coop-

erative. The creditor is not a private lender but a federal agency.

Wabash's Members are not owners in any usual sense of the term. By design, "in a co-operative association the concept of profit is inappropriate, because profit, in its recognized economic sense, is the wage of the entrepreneur, and in a co-operative there is no entrepreneur." Emmanuel S. Tyson, Annotation, *Co-operative Associations: Rights in Equity Credits or Patronage Dividends*, 50 A.L.R.3d 435 (1995). Pursuant to state law and the rules of the co-operative, Wabash Members receive no profits, nor do they have any current or prospective ownership rights in the corporate assets. Under Indiana law any assets remaining to the cooperative after a liquidation or dissolution escheat to the state. *Bktcy.Op.* at 8, citing Ind.Code §§ 23-7-1.1-4(c), 14(a), and 33(b)(3)(E) (repealed 1991, similar provisions now at §§ 23-17-1-1 *et seq.*). Indeed, almost the only prerogative Members share with shareholders in an ordinary business corporation is the right to elect a board of directors.

The primary benefit to the members of an electric co-operative accrues to them in their role as customers with access to electric power at favorable rates. These rates, in Wabash's case, are largely controlled by Indiana regulations and must be approved by state authorities. State law requires that ratepayers pay only the cost to produce the electricity they purchase. Cooperatives are arguably able to offer lower rates, primarily because they are so constituted that profit or return to equity is not part of their cost to produce and they can borrow money at low interest rates.

Given all of this, it is small wonder that the rules of Chapter 11 bankruptcy, primarily designed as they

are for profit-seeking enterprises, are less than straightforward to apply here.

I. The Absolute Priority Rule—Background

In its origins, the absolute priority rule was a judicial invention designed to preclude the practice in railroad reorganizations of "squeezing out" intermediate unsecured creditors through collusion between secured creditors and stockholders (who were often the same people). *Northern P. Ry. Co. v. Boyd*, 228 U.S. 482, 33 S.Ct. 554, 57 L.Ed. 931 (1913). *See also, e.g.*, John D. Ayer, *Rethinking Absolute Priority after Ahlers*, 87 Mich.L.Rev. 963, 969-73 (1989) (discussing the history of the absolute priority rule). The rule was thus devised primarily to deal with a situation of overlapping ownership and creditor interests.

More recently, however, courts have dealt with a second type of overlap—that between owner and manager or employee. Most of these cases seem to involve either farmers or owners of close corporations. *See, e.g., Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988); *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 60 S.Ct. 1, 84 L.Ed. 110 (1939); *In re Stegall*, 865 F.2d 140 (7th Cir.1989); *Unruh v. Rushville State Bank*, 987 F.2d 1506 (10th Cir.1993); *In re Snyder*, 967 F.2d 1126 (7th Cir.1992); *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351 (7th Cir.1990). These cases deal with the situation in which an equity owner also performs important functions in running the business—contributing intangibles such as labor, reputation and experience. These owner-managers have, in these and other cases, argued that they should retain an ownership interest in the reorgan-

ized corporation, not on account of their past ownership per se, but in exchange for a promise to contribute their labor and managerial skills to the future running of the corporation.

Courts have taken a dim view of such exchanges and the Supreme Court in *Ahlers* roundly rejected the contention that such contributions may justify the retention of an ownership interest in the face of creditor disapproval. 485 U.S. at 204-05, 108 S.Ct. at 967-68. In rejecting these attempts the courts have cited the difficulty of valuing and enforcing these intangible contributions and have also been reluctant to overrule the creditors' view that retention of management is not worth what it may cost. 485 U.S. at 204-07, 108 S.Ct. at 967-69; 908 F.2d at 1359-60; 865 F.2d at 142.

At the same time, however, in recognition of the fact that prior owners may sometimes be the best "buyers" of a reorganized corporation, courts are reluctant to squeeze the old owners out entirely. 967 F.2d at 1130. This reluctance is especially evident when the debtor is a closely held corporation or a sole proprietorship. This tension has been a driving force behind the development of the new value "exception" which allows old owners to retain equity if they contribute new value in the form of "money or money's worth" which is "necessary" to the reorganization and "reasonably equivalent" to the interest they retain. 308 U.S. at 121, 60 S.Ct. at 10; *In re Potter Material Serv., Inc.*, 781 F.2d 99, 101 (7th Cir.1986).

With the codification of the absolute priority rule, the continued validity of the new value exception has been questioned, with some authorities arguing it is no longer valid because it does not appear expressly in

the Code. Other decisions simply assume its continued validity as part of the context within which Congress enacted the Bankruptcy Code. Still others have suggested that it is not an exception at all, but simply a concrete example of an interest which is retained not "on account of" a prior interest but for other reasons. *See, e.g.*, Julie L. Friedberg, *Wanted Dead or Alive: The New Value Exception to the Absolute Priority Rule*, 66 Temple L.Rev. 893 (1993); Clifford S. Harris, *A Rule Unvanquished: The New Value Exception to the Absolute Priority Rule*, 89 Mich.L.Rev. 2303 (1991) (assessing the continued vitality of the new value exception and collecting cases). *See also, In re Bonner Mall Partnership*, 2 F.3d 899 (9th Cir.1993) (discussing various approaches to the new value exception and upholding its continued validity). The question has been left open by the Supreme Court and by this circuit, see *Kham & Nate's Shoes*, 908 F.2d at 1362 and *In re Snyder*, 967 F.2d at 1130-31, and there is no need to decide it here.

In an attempt to satisfy the new value exception, the Wabash Plan provides for its Members to contribute $3.2 million to Wabash in new capital (to support ongoing utility operations). The bankruptcy court found that this contribution exceeds the value of any interest the Members might be retaining or receiving under the Plan. The bankruptcy court also found that this contribution qualified the arrangement for invocation of the new value exception. As noted, we will not address this issue here.

The common thread running through cases involving the absolute priority rule is a refusal to allow prior equity owners to trade on their "insider" status to acquire new equity for less than its value. The situation we examine here appears to involve a

similar sort of confluence of interests since the Members are both customers and controllers of the corporation. However, our analysis must differ substantially from that followed in many other cases because a member of a non-profit cooperative occupies a position different from that of a stockholder of a business corporation. Because of the way in which the rights of Members of Wabash are constrained both by state law and by the organization's own bylaws, we believe that the Members may continue in control of the reorganized co-operative without violating the absolute priority rule. Beyond complying with the rule, this outcome also seems to make economic sense, since it maximizes the value available to meet creditor claims.

II. Application of the Absolute Priority Rule to the Wabash Plan

REA contends that the Wabash Plan violates the absolute priority rule in two ways. First, REA argues that certain "patronage capital accounts," which provide a credit to customers for the amount by which rates exceed fluctuating costs, are not claims, as they are classified in the Wabash Plan, but are, instead, equity interests. REA thus argues that the Members may not, under the absolute priority rule, receive any part of the amounts credited to them. As classified by Wabash, the accounts are claims and are not junior to REA's unsecured claim. If this classification is correct, they may be paid to the same extent as other unsecured debt. Equity interests, on the other hand, would be subordinate to REA's unsecured debt, which is not fully paid under the Plan. Payment with respect to equity interests would violate the absolute priority rule. We find, however, that the patronage capital accounts give rise to *claims* and

may be paid as the Wabash Plan prescribes. The Plan contemplates payment of these claims in the same proportion as other unsecured debt is paid.[4]

Second, REA argues that the control over the reorganized cooperative (and thereby over the rates paid by Members) which the Members will exercise by virtue of their continued Board representation is property which the Members "retain on account of" their prior interests in the organization. We believe, however, that Wabash Members do not hold equity interests in the cooperative. It is therefore impossible for them to retain any property "on account of" such interests.

A. Patronage Capital

The cooperative Members are classified under the Wabash Plan as holding "claims" for the reimbursement of "patronage capital." Wabash Plan at §§ 3.11 and 3.12. Because of the difficulty of anticipating exactly what the costs of producing power will be, utilities sometimes collect excess revenues. State law requires that customers be reimbursed for these overcharges. Ind.Code § 8-1-13-17(d) (1995). Patronage capital is a somewhat misleading term which refers to a portion of this excess revenue which the Wabash Bylaws allow it to retain in order to cover fluctuations in production costs and to make capital expenditures without having first to raise rates and

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[4] REA contends that, even if the patronage capital accounts are claims, they are junior to REA's unsecured claim. REA Brief at 21, n. 14; 41, n. 27. The only one of its arguments which is relevant here is that patronage capital, whether a claim or an interest, is only payable at dissolution if other creditors are paid in full. The case cited to support this contention is not in point and REA cites no other authority.

accumulate the necessary funds. Because the Members must eventually be reimbursed for overcharges, however, the "patronage capital" funds are credited to individual cooperative Members in amounts proportional to their purchases of electricity. Wabash Bylaws, Art. VII, Sec. 2. The timing of repayment of these overcharges is left to the discretion of the Wabash Board. Transcript of Confirmation Hearing, Jan. 3, 1990, Testimony of Edward P. Martin, p. 24.

REA argues that these accounts are not claims but rather equity interests junior to REA's unsecured claims, and that the payment of any portion of these amounts, as envisioned in the Wabash Plan, violates the absolute priority rule. The district court, affirming the bankruptcy court, held, however, that these accounts were correctly classified as claims, the proportionate payment of which under the Wabash Plan is not a violation of the rule. *Dist.Op.* at 7-10. Although this is an extraordinarily elusive question, we agree.

The definition of "claim" under the bankruptcy code is very broad, encompassing any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A). Thus the fact that the patronage capital accounts are not payable at a specified time or under specified conditions does not foreclose their treatment as claims for bankruptcy purposes.[5]

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[5] Cases cited by REA which resolve disputes about the redemption of patronage capital accounts upon the bankruptcy of a member are distinguishable. Besides presenting different substantive issues, these cases involve agricultural cooperatives

In reaching this conclusion we have carefully considered the opinion of the bankruptcy court in *In re Eastern Maine Electric Coop., Inc.*, 125 B.R. 329 (Bankr. D. Me. 1991) (*In re EMEC*), in which a similar issue was presented. The court in that case concluded that patronage capital accounts were not "claims" under the bankruptcy code because "all such claims have one feature in common: there exists or may come to exist a set of facts, capable of proof, that will require the debtor to encounter liability, whether it chooses to do so or not." *Id.* at 338 n. 42. The bankruptcy court believed that the patronage capital accounts involved in that case lacked this characteristic because repayment was at the discretion of the board of directors. (In fact, the accounts apparently were due upon dissolution or liquidation of the cooperative in that case.) Primarily on that basis, the court concluded that "allocated patronage capital the directors have not voted to retire remains an ownership interest." *Id.* at 339.

In re EMEC is distinguishable because it was decided under Maine law and under different corporate articles and bylaws, but, in any event, we question the apparent basis of the decision. First, we are not persuaded that the apparent absence of a specified date or condition for maturity of the obligation to

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and were decided under the law of states other than Indiana. *In re Axvig*, 68 B.R. 910 (Bankr. D. N.D. 1987); *In re FCX, Inc.*, 853 F.2d 1149 (4th Cir.1988); *In re Beck*, 96 B.R. 161 (Bankr. C.D. Ill. 1988). *In re F.L.F. Farmers Coop. Ass'n*, 170 F.Supp. 497 (D. N.J. 1958), cited by the *EMEC* court, also involved an agricultural cooperative and was decided under New Jersey law.

repay is sufficient to require classification of the patronage capital accounts as ownership interests.[6]

Because patronage capital accounts are unique to the cooperative scheme, they differ from more commonly encountered forms of corporate debt. However, while they may lack a specified maturity, they do not otherwise evince the usual attributes of equity investment. For example, the amount credited to a Member's patronage capital account is proportionate to the amount of electricity the Member purchases rather than being the same for all Members (as would be typical of an "ownership" interest). The refund is determined by the amount by which Wabash's revenues exceed the approved revenue requirement. The sum credited is therefore essentially a rate adjustment.

Second, the characterization of patronage capital accounts in different jurisdictions does not admit of a uniform resolution; instead it is determined by state law and the relevant articles and bylaws as applied to particular cooperative organizations. 68 B.R. at 915; 125 B.R. at 336. *See also* 50 A.L.R.3d 435 (citing state non-utility cases holding both for and against the proposition that patronage capital accounts consti-

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[6] We note that there have been other debt instruments having no maturity date. One of the best known is the English consol, a bond issued without maturity and perpetually outstanding. The total value of these bonds issued and outstanding is not known but it certainly was very substantial. It is true that these bonds regularly paid interest, but their principal never became due and payable (unless they were called). The United States issued consols having no maturity to finance the Panama Canal. These bonds were eventually called. Randolph W. Westerfield & Jeffrey F. Jaffe, *Corporate Finance* 119 (3d ed. 1990).

tute a "debt" owed to the Members and cases reaching various results as to the priority of member claims to patronage capital in bankruptcy). In addition, relevant decisions of the state courts involving Wabash and the particulars of the Wabash bylaws both distinguish this case from *In re EMEC*.

The Indiana statutes governing electric cooperatives do not permit the members to receive or retain ownership interests in the assets of the cooperative. Instead, if a cooperative is dissolved, "any assets remaining after all liabilities or obligations of the corporation have been satisfied or discharged shall pass to and become the property of the state." Ind.Code § 8-1-13-21 (1995). Neither is the cooperative itself allowed to retain revenues which have been collected in excess of the cost of service Ind.Code § 8-1-13- 17(d) (1995). The seeming inconsistency between the ban on member ownership of cooperative assets and the existence of the patronage capital accounts is most easily resolved if these accounts are viewed as loans or advances by the member to the cooperative to fulfill various corporate needs. Such loans or advances are specifically authorized by Indiana law. Ind. Code § 23-17-7-9 (1995) (similar provisions formerly at § 23-7-1.1-7 (1990)). The reference to patronage capital in the Wabash Bylaws containing the assertion that the accounts "are the property of the members . . . furnished by the members as contributions to capital," is entirely consistent with this analysis Wabash Bylaws, Art. VII, Sec. 2. This language ("property of the members") strongly suggests an advance of a determinate amount of money from the Member to the cooperative with a fixed obligation to repay.

Our own analysis of Indiana law aside, the issue whether Wabash's Members are investors having ownership interests has been decided by the Indiana Supreme Court. In its decision denying a rate increase for the purpose of repaying Marble Hill debt, the Court discussed the status of Wabash's Members with respect to monies paid for electric service in excess of the "cost of production." *National Rural Utils. Coop. Finance Corp.*, 552 N.E.2d at 26 27. The Supreme Court found that the cooperative's Members are not investors because ". . . the terms of Wabash's articles of incorporation provide that patrons or owners are not to furnish capital to finance utility plants nor are they to recover profits from utility operations, thus precluding meaningful participation in the utility as investors." *Id.* at 27. If Wabash Members are not investors, it is difficult to conclude that they have equity interests.

Under Indiana law, the patronage capital accounts are not equity interests but credits for overpayments for electric service. The district court was therefore correct in concluding that the patronage capital accounts are properly classified as unsecured claims on behalf of the Members and that the partial and proportionate payment of these claims under the Wabash Plan does not violate the absolute priority rule.

B. Control of the Reorganized Cooperative

REA makes another argument that the Wabash Plan violates the absolute priority rule by allowing the Members to retain control of the cooperative through the appointment of representatives to its Board. The issue is whether this type of control

constitutes "property" which is retained "*on account of*" prior interests of the Members.

The absolute priority rule is an aspect of the requirement that a plan be "fair and equitable." There is some appearance of unfairness in the Wabash Plan. Wabash's member distribution cooperatives, whose representatives approved the Marble Hill fiasco, emerge from bankruptcy in the driver's seat, still paying low rates, and still not paying off the REA debt. This outcome, however, is justified, even dictated, by Wabash's cooperative structure. The Members, by controlling Wabash, control their own rates, making it possible for them to be served under the 40-year requirements contracts, which are, in turn, Wabash's most valuable possession.

In addition to its technical compliance with the absolute priority rule, the retention of control by Wabash Members is not as unfair as it might seem, given REA's role in encouraging investment in nuclear plants.[7] In addition, since Wabash was specifically designed to supply its own Members,

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[7] *See, e.g., Greensboro Lumber Co. v. Georgia Power Co.*, 643 F.Supp. 1345, 1360-61 (N.D.Ga.1986), *aff'd*, 844 F.2d 1538 (11th Cir.1988); *Vermont Co-op Refunding 19.5% Hike as PSB Rejects Debt Restructuring*, Electric Utility Week, Jan. 24, 1994, Rates & Regulation at 5 (quoting comments of the Vermont Public Service Board regarding REA encouragement of nuclear plant investment by Vermont Electric Cooperative); John Hall & Charlie Chapple, *Cajun Electric Cooperative Seeks Bankruptcy Protection*, New Orleans Times-Picayune, Dec. 22, 1994, Money Section (quoting Public Service Commission lawyer regarding REA encouragement of nuclear plant investment by Cajun Electric Cooperative); Rep. Richard J. Durbin, *Letter to the Editor: Nuclear Plants Fuel a Rural-Electric Nightmare*, N.Y. Times, Sept. 15, 1986, at A14 (citing REA encouragement of nuclear plant investment).

their continuation as customers in control of Wabash is a means of maximizing the value of the estate for the benefit of creditors.

1. Control of Wabash is Not an Equity Interest

Non-profit cooperatives are creations of the legislature. Cooperatives are designed explicitly to allow customers to receive the benefits, in the form of lower prices, which might ordinarily accrue to the owners of equity. While it is true that customers "profit" from this arrangement in some rough sense, the statutory scheme specifically rejects the concept that these savings are profits accruing to ownership. The potential for lower prices is simply not an interest cognizable in bankruptcy. Nor, for that matter, are price benefits income for tax purposes. Members join electric cooperatives with the expectation of access to electricity and in anticipation of low rates. But, neither the lower rates themselves nor any refunds of overcharges, which are mandated to avoid the making of a profit, constitute property received on account of an equity interest.

REA cites cases holding that control is property for purposes of the absolute priority rule. *See, e.g., Ahlers*; *In re Stegall*; *In re Genesee Cement, Inc.*, 31 B.R. 442 (Bankr.E.D.Mich.1983); *In re Pecht*, 53 B.R. 768 (Bankr.E.D.Va.1985). These are, however, business corporation cases. In the ordinary commercial context, the prerogatives of equity ownership include not only the right to control corporate decisionmaking but also the right to a share in profits and in the ownership of corporate assets on dissolution. When associated with an equity interest in a business corporation, control contributes to value—hence the premium investors are willing to pay for a controlling

interest in a business corporation. Indeed, as recognized by the Supreme Court in *Ahlers*, control of a profit-making entity in which one holds an equity interest is valuable even "where debts far exceed the current value of assets" because of "the interest in potential future profits of a now-insolvent business." 485 U.S. at 208, 108 S.Ct. at 969 (dismissing the "no value" argument made by the debtor). Control is not essential to an equity interest, as the existence of non-voting stock demonstrates. A share of profits, however, is essential. Control alone, divorced from any right to share in corporate profits or assets, does not amount to an equity interest.

The mere fact that the Members of Wabash are benefited by Wabash's operation and might be disadvantaged by its demise also does not give them an "interest" cognizable in bankruptcy. Employees, managers and customers, among others, always have an interest, in the broadest sense, in a corporation. The factor which distinguishes these parties from stockholders is not "control" per se (managers, after all, have at least a limited control) but the ability to make use of that control to generate profits or to increase their own share of profits.

In re Whittaker Memorial Hospital Ass'n, 149 B.R. 812 (Bankr.E.D.Va.1993) illustrates this point. *Whittaker* concerned a non-profit hospital. There the bankruptcy court held that the retention of control of the hospital by the same individuals who controlled it prior to bankruptcy did not violate the absolute priority rule since "the present group retaining control over the debtor entity does not give them anything, certainly not a favored position over [the dissenting creditor]. . . . Clearly there is no distribution to this group and nothing beyond control that passes to it."

Id. at 816. *Cf. In re S.A.B.T.C. Townhouse Ass'n*, 152 B.R. 1005 (Bankr.M.D.Fla.1993) (precluding members of non-profit cooperative from retaining control of cooperatively owned real estate).

The *Whittaker* result seems clear since, among other things, the individuals exercising control over that non-profit corporation were not themselves users of its service. In an electric cooperative, on the other hand, each member has two roles. As a participant in control of the cooperative, each member is required by Indiana law and the rules of the organization to keep rates low. In its role as customer, each member benefits to the extent that rates are kept low. This is an inescapable product of the cooperative form, however, and of the identity of users and controllers. This is not exploitation of insider status of the sort the absolute priority rule was designed to prevent.

There is no essential difference between allowing the Whittaker board to remain in control of the hospital and allowing the Members to remain in control of Wabash. The board of a non-profit organization has a fiduciary duty to manage the organization according to the best interests of the population it is intended to serve (in the case of Wabash, the Member-customers). The cooperative structure simply recognizes the obvious fact that the Members themselves can be counted on to take that duty seriously.

2. The Retention of Wabash's Essential Structure is Not Unfair to REA

REA was and is, of course, fully aware of the identity of Wabash's Members as (1) controllers of its operations and (2) users of its power. In making loans, REA may be charged with knowledge of

Wabash's structure in the same way that a lender to a business corporation would know that stockholders are not ordinarily liable for the debts of the corporation. To address the problem of Wabash's structure, REA relied primarily on its security interest in Wabash's 40-year Supply Contracts with its Members, which were to provide a reliable source of revenue from which Wabash could pay its debt. *See Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1349-50 (10th Cir.1989); *United States v. Southwestern Electric Coop., Inc.*, 869 F.2d 310, 312 (7th Cir.1989) (discussing this REA practice). The principal reason that these contracts did not fulfill this purpose was the refusal of Indiana regulators to recognize Marble Hill as an asset for rate-making purposes. If the issue is whether REA or Wabash's Members should bear the burden of the Marble Hill debacle, it is not immediately apparent why the Members are more culpable. Presumably, REA, a promoter of nuclear power,[8] knew the risks as well as anyone.

3. The Wabash Plan Makes Economic Sense

REA is by far the biggest unsecured and secured creditor of Wabash. A cramdown of the Wabash Plan over REA's strenuous opposition is therefore a very serious matter and one requiring the most careful consideration of whether the Plan is fair and equitable to REA. To be weighed in the balance, however, is the fact that the only apparent alternative to a cramdown is liquidation, under which REA's recovery would be less than under the Wabash Plan. Thus, the bankruptcy court found that Wabash has a going-

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[8] *See* note 7, *supra*.

concern value of $190 million, a liquidation value of $213.2 million and a maximum value to Wabash's Members of $221.7 million. The greater magnitude of the last figure provides a good reason for leaving Wabash's structure intact. The REA Reorganization Plan, on the other hand, which would have required substantial (and presumably unrealizable) rate increases, was rejected by the bankruptcy court and no appeal has been taken. There is, therefore, no indication that an alternative to the Wabash Plan, other than liquidation, exists. This is a consideration which certainly does not excuse compliance with the absolute priority rule, but it is nonetheless a fact of which we must remain aware.

Under the Wabash Plan, REA is being awarded its share of Wabash's going-concern value in partial satisfaction of its secured debt. In addition, and extremely important to the economics of the Wabash Plan, REA will also recover a portion of the PSI Settlement, which is only available under the Wabash Plan, and small amounts from other sources. The total amount REA will receive in satisfaction of its secured claim is approximately $400 million. Further, under the Plan, REA is to receive, in partial satisfaction of its unsecured debt, an additional amount representing the value to Wabash's Members of the cost savings achieved by having Wabash as a supplier of power. Thus REA's total recovery under the Wabash Plan is $430.6 million and all creditors together will receive approximately $457 million. No non-Member control could squeeze as much out of Wabash as a going concern and considerably less could be realized by liquidation, particularly considering the loss of the PSI Settlement.

III. The Absolute Priority Rule—Conclusion

In summary, while Wabash's member cooperatives obtain some economic benefit as customers from their participation on Wabash's Board, they do not improperly retain property "on account of" either their patronage capital accounts (which are mere refunds of overpayments) or their control over Wabash. Control of the cooperative provides no opportunity, either currently or in the future, for the Members to obtain profits or any equity in Wabash's assets and control itself is not an equity interest. Further, control of Wabash's Board provides the Members with no opportunity to benefit at REA's expense. Two factors outside the Members' control have prevented REA from collecting more of its outstanding debt: the non-profit structure of cooperatives and, most important, the fact that the only conceivable source of funds—increased rates—is foreclosed by state law and the prior decisions of this court.

OTHER WABASH ISSUES

I. The Plan's Compliance with 11 U.S.C. § 1129(a)(10)

11 U.S.C. § 1129(a)(10) requires that at least one non-insider impaired class of creditors accept a proposed reorganization plan before it is eligible for cramdown. The bankruptcy court found that the Wabash Plan was accepted by two such classes of creditors—Class 9 (PSI) and Class 11 (Members' Patronage Capital Claims)—thus fulfilling the requirements of § 1129(a)(10). On appeal, REA objects to these findings. As Wabash points out in reply, these objections were not raised by REA until after the close of the objection period set by the bankruptcy court and the completion of the confirmation hearing.

While they were raised in a post-hearing brief, the bankruptcy court apparently considered these objections waived, since it found that "no objections to confirmation were filed under this section." *Bktcy.Op.* at 119. REA argues, however, that, since the waiver rule is applied more flexibly in bankruptcy proceedings and the court is required to ascertain whether a plan complies with the cramdown requirements, *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1213-14 (9th Cir.1994), it may appropriately raise its objections here.[9]

We need not determine the extent to which REA's various objections are waived by its failure to raise them in a timely fashion because we find that the Plan properly classifies PSI's claims separately from those of the other unsecured creditors and there is no clear error in the bankruptcy court's determination that PSI's claims are impaired by the Plan.

A debtor in bankruptcy has considerable discretion to classify claims and interests in a chapter 11 reorganization plan. *In re Woodbrook Assocs.*, 19 F.3d 312 (7th Cir. 1994). While a debtor may not separately classify claims solely in order to "gerrymander an affirmative vote on reorganization," claims may be classified separately if "significant disparities exist between the legal rights of the holder[s of the different claims] which render the two claims not substan-

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[9] REA also contends that it sufficiently raised these objections by virtue of its timely objections to other aspects of the classification scheme, which it claims gave Wabash sufficient notice of the objections. *In re Woodbrook Assocs.*, 19 F.3d 312, 316 (7th Cir.1994). This contention is patently wrong, especially as regards PSI, since the REA's own proposed confirmation plan classified PSI exactly the same way as does the Wabash Plan it now opposes.

tially similar." *Id.* at 318. Claims may also be separately classified if there are "good business reasons" to do so or if the claimants have sufficiently different interests in the plan. *See In re U.S. Truck Co.*, 800 F.2d 581, 583-87 (6th Cir.1986); *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters. (In re Briscoe Enters.)*, 994 F.2d 1160, 1166-67 (5th Cir.1993), *cert. denied*, — U.S. ——, 114 S.Ct. 550, 126 L.Ed.2d 451 (1993). Because the confirmation of this Plan affects PSI's interests both with respect to its settlement of other litigation between it and Wabash and with respect to its ongoing business relationship with Wabash, its stake in the Wabash reorganization differs significantly enough from that of the other unsecured creditors to warrant the separate classification of its claims. (Indeed, REA apparently recognized this fact since its own proposed reorganization plan also classified PSI's claims separately.)

We review the determination whether PSI's claim is impaired for clear error. REA contends that, because PSI agreed to the terms of the PSI Settlement, it cannot remain impaired under the Wabash Plan which is, after all, in accordance with those terms. The PSI Settlement, however, is not a separate agreement entered into by the debtor prior to filing a reorganization plan. Instead, it is inextricably intertwined with and dependent on the reorganization plan. PSI's recovery under the settlement will depend on whether the Wabash Plan is approved. Thus, this is not a situation in which a claim has been settled prior to confirmation of a reorganization plan and confirmation therefore leaves the parties' rights unaffected. *Cf. 5 Collier on Bankruptcy* ¶ 1124.03[1] (15th ed. 1994). The standard for impairment is very lenient and "any alteration of the rights constitutes

impairment even if the value of the rights is enhanced." *Id.* PSI's rights are certainly affected by the confirmation of the Wabash Plan. There is thus no clear error in the bankruptcy court's determination that PSI is an impaired creditor whose acceptance of the Plan fulfills the requirements of § 1129(a)(10).[10]

Because we find that Class 9 (PSI) is impaired under the Wabash Plan we need not decide whether Wabash's Members are "insiders" whose acceptance of the Plan would not be sufficient to justify a cramdown. *Cf. In re EMEC*, 125 B.R. at 334-35 (members of retail electric cooperative not insiders for cramdown purposes).

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[10] REA also suggests that, even if PSI is impaired by the Plan, it is an "artificial impairment" invented solely for the purposes of effectuating a cramdown. *See, e.g., Windsor on the River Assocs. v. Balcor Real Estate Fin. (In re Windsor on the River Assocs.)*, 7 F.3d 127 (8th Cir.1993). Because REA did not raise this objection until after the close of the confirmation hearing, no evidence on this question appears in the record. While it may be true that rules regarding waiver are applied more flexibly in bankruptcy proceedings than in the context of ordinary adversarial litigation, we will not revisit issues, such as the allegedly improper purposes of the debtor, which were impliedly decided by the bankruptcy court. *In re Perez*, 30 F.3d at 1213-14. A finding of "artificial impairment" requires an inquiry into the purposes of the debtor which is not appropriately undertaken by a reviewing court when the creditor pressing the argument has failed to develop a record on the issue which we might review. *Id.* at 1214. *See also In re Woodbrook Assocs.*, 19 F.3d at 318 (rule against artificial classification difficult to apply since it is about the debtor's purpose).

II. The Deduction of the Prepayments from the *Timbers* Account from REA's Secured Claim

REA disputes the deduction from its secured claim of approximately $28 million of debt service paid to it by Wabash during the post-petition period. This payment resulted from an earlier dispute in this case. Wabash initially contested its obligation (and indeed its right under rate regulations) to continue to make payments to REA in service of its non-Marble Hill debt after filing its bankruptcy petition. Because Wabash believed itself relieved of the obligation of servicing its debt during the pendency of the bankruptcy petition. Wabash argued that it was therefore required to reduce its rates rather than to continue to make such payments to REA. While that dispute was under consideration by the bankruptcy court, Wabash made its payments into an escrow account (the *Timbers* Account). In July 1990 the bankruptcy court ordered the funds turned over to REA as "a payment to reduce the principal of the non-Marble Hill debt." *Timbers* Order at 4-5.

The bankruptcy court reasoned that, since rate payments may, in principle, be used to pay for Wabash's non-Marble Hill debt, it was of no import when those payments were made. "[I]n either case, the members will pay the non-Marble Hill debt through the rates they are charged." *Id.* at 5. The court thus concluded that it was pointless to allow Wabash's rates to be adjusted downward due to the temporary suspension of its obligation to pay the debt, only to be raised again at a later date when the obligation was reimposed. As the bankruptcy court pointed out: "It can make no difference to the Debtor, and little difference to the members, whether the

funds are in effect returned to the members through lower rates now or whether the members pay lower rates in the future as a result of application of the funds to the non-Marble Hill debt now." *Id.*

Pursuant to the court's order, Wabash released the money in the *Timbers* Account to REA and, in its reorganization plan, deducted the payment from REA's claim. The issue on appeal is whether it was appropriate for REA to deduct this payment from the secured portion of REA's claim.

A secured creditor is not ordinarily entitled to any "property acquired by the . . . debtor after the commencement of the case." 11 U.S.C. § 552(a) (1995). Post-petition debt payments to an undersecured creditor which are taken from after-acquired property will thus ordinarily be used to reduce the principal amount of the secured debt. *See, e.g., In re Maun*, 95 B.R. 94 (Bankr. S.D. Ill.1989). There is an exception to this rule that secured creditors are not entitled to after-acquired property. The exception applies if the security agreement specifically provides that the security interest created extends to "proceeds, product, offspring, or profits" of the collateral or to "rents" paid on it. 11 U.S.C. § 552(b) (1995). REA has not argued that the monies in the *Timbers* Account fall into any of these categories—nor would there seem to be any basis to conclude that they do.[11]

REA also appears to take issue with the fact that the calculation of Wabash's "going-concern value"

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[11] REA cites *In re Veeco Inv. Co., L.P.*, 170 B.R. 149 (Bankr.E.D.Mo.1994) in support of its argument. However, In re Veeco concerns a situation in which the secured creditor had a perfected security interest in rents, clearly distinguishing it from the present case.

was based on projected revenues beginning in 1991 and did not include the revenues already earned and deposited in the *Timbers* Account. However, the Supreme Court's decision in *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988) generally precludes including as part of a secured claim any value stemming from the debtor's use of the collateral during the pendency of the bankruptcy proceedings. All revenues, except for those specifically excepted under § 552(b), as discussed *supra*, are deemed part of this unavailable "use value." This holding squarely prohibits the inclusion of the *Timbers* Account revenues in the going-concern valuation of Wabash. The bankruptcy court thus properly treated these funds as post-petition payments for debt service, to be credited against the secured part of REA's claim.

III. The Use of the Going-Concern Value Rather than the Value to the Members in Valuation of REA's Security Interest

The valuation of a secured claim is a question of fact which can be overturned only if it is clearly erroneous. *In re Vitreous* Steel Products Co., 911 F.2d 1223, 1233 (7th Cir.1990). Here the bankruptcy court carefully considered extensive expert testimony on the valuation issue. The methods used by the experts on whose testimony the bankruptcy court relied were standard methods for determining fair market value using the "willing buyer/willing seller" framework. This determination of the fair market value was not clearly erroneous.

However, REA also contends that the use of the fair market value rather than the value to the Members in determining the extent of its secured

claim is incorrect under 11 U.S.C. § 506(a). REA Reply Br. at 17-18. Under this statute, a secured claim reaches "to the extent of the value of such creditor's interest in the estate's interest in such property" as "determined in light of the purpose of the valuation and of the proposed disposition or use" of the property. Courts have differed as to how to value the creditor's interest pursuant to § 506(a) in those cases where the debtor is to retain the property securing the debt. The issue is whether the "value of such creditor's interest" is the amount that a creditor could recover through a sale of the assets securing the debt (either separately or as part of a going concern). The alternative standard where there is no sale is that the security interest covers the entire value that the assets retain in the debtor's hands under the reorganization plan. Most of the cases concern whether the hypothetical costs of selling the assets should be deducted from the secured creditor's claim even though the debtor intends to retain the property after reorganization. *See, e.g., In re Balbus*, 933 F.2d 246 (4th Cir.1991); *Metrobank v. Trimble (In re Trimble)*, 50 F.3d 530 (8th Cir.1995) (discussing cases). Here, REA contends that, if the Members are to retain control of Wabash, its secured claim must be valued at the "value to the Members" rather than at the value that could be obtained in a hypothetical sale to a third party.

This circuit has yet to resolve this § 506(a) issue, nor need we resolve it here, because REA has waived the argument. In its brief to the district court, in fact, REA freely conceded that "the value of REA's and CFC's security interests is the going-concern value of all of Wabash's assets." Dist.Ct.Rec.Doc. 7 at

44. Throughout that brief REA assumed without discussion that the "willing buyer/willing seller" model (an approach to determining fair market value) was the correct approach to valuing its claim (although it disputed Wabash's implementation of the model). Even in its brief to this court, REA states only that "it is anomalous to fix REA's lien at the lower of Wabash's value to a third party or to its owners where the plan gives to the owners the property being valued." Appellant's Br. at 45. The brief cites neither case law nor statute in support of this statement. Only in its reply brief does REA raise the question whether the valuation approach taken by the bankruptcy court comports with the dictates of § 506(a), citing only one case discussing the issue. Such minimal treatment of the issue is too little, too late. *Doe v. Johnson*, 52 F.3d 1448, 1457 (7th Cir.1995). The matter is not properly preserved for our consideration. We might add that, in any event, under the Wabash Plan, REA and the other secured creditor, CFC, are in fact awarded the difference between the two valuations in satisfaction of their unsecured claims; thus no inequity results.

IV. Validity of the Rate Realignment Settlements

Finally, REA challenges a provision in the Rate Realignment Settlements, which Wabash negotiated with its Members and with the relevant state regulatory agencies. The challenged provision would go into effect only if the Wabash Plan were not confirmed. Since we uphold confirmation of the Plan, the issue is now moot.

For all the foregoing reasons, the judgment of the district court affirming the approval of the Wabash Plan by the bankruptcy court is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause Nos. IP 91-928-C
IP 91-929-C
IP 91-930-C
IP 91-301-C
IP 92-1468-C
IP 93-1551-C

UNITED STATES OF AMERICA, APPELLANT

v.

WABASH VALLEY POWER ASSOCIATION, INC., APPELLEE

IN RE: WABASH VALLEY POWER ASSOCIATION, INC., DEBTOR

[June 28, 1994]

BACKGROUND

These cases pend on appeal from the bankruptcy court. This is the second opportunity that this Court has had to look at the plethora of litigation surrounding the failed nuclear power experiment in Indiana. Detailed histories of the experiment and the litigation are found in all the prior reported cases on this situation and will not be repeated today. Wabash Valley borrowed $486,000,000 in funds guaranteed by

the REA and invested that amount in the Marble Hill nuclear facility. The Marble Hill project was abandoned. Wabash Valley went into Chapter 11 Bankruptcy. When this Court last looked at the litigation, several legal questions remained unanswered by the courts. Those questions have now been answered and the landscape of this litigation has been fundamentally altered.

At the time of the last appeal this Court was concerned about the valuation of the debtor Wabash Valley. Just prior to that appeal, Wabash Valley had filed for a 51% rate increase to pay for its Marble Hill debt. While that rate increase was pending, the Indiana Supreme Court in *Citizens Action Coalition v. NIPSCO*, 485 N.E.2d 610 (Ind. 1985), *cert. denied*, 476 U.S. 1173 (1986), ruled that an investor owned utility could not raise its rates to recover the costs of a cancelled nuclear power plant. Citing the principles outlined in that case, the Utility Commissioner denied the 51% rate request of Wabash Valley. The Commissioner's decision was appealed, and the Court of Appeals in *National Rural Utilities Cooperative Finance Corp. v. Public Service Commission*, 528 N.E.2d 95 (Ind. App. 1988), *aff'd*, 552 N.E.2d 23 (Ind. 1990), affirmed the decision of the Public Service Commission. The matter was then appealed to the Indiana Supreme Court. The Supreme Court of Indiana had not spoken at the time this Court reversed the decision of the bankruptcy court.

NEW CASE LAW

The Indiana Supreme Court in *National Rural Utilities Cooperative Finance Corp. v. Public Service Commission*, 552 N.E.2d 23 (Ind. 1990) affirmed the lower Court. The Indiana Supreme Court dealt

directly with the issue of who bears the burden of this debt guaranteed by the REA. "A utility may impose a charge on its ratepayers only for service, which is defined as 'the furnishing of energy, and the rendering of engineering, financial, accounting, or educational services incidental to the production, transmission, or use of energy.'" I.C. 8-1-13-3(m). Further, the rate a utility charges for the service provided to its ratepayers may include the expenses incurred in the operation of its system, which is defined as "any plant, works, system, facilities, or properties . . . used or useful in the generation, production, transmission, or distribution of energy." 552 N.E.2d at 27. The court reasoned that because Marble Hill was never either used or useful, "none of the operation expenses associated with the project were properly chargeable to the Wabash ratepayers." 552 N.E.2d 23, 28. The "used and useful" rule from *NIPSCO* was thus unequivocally applied by the Indiana Supreme Court to Wabash Valley.

The Indiana Supreme Court declined to address the proposition that the REA might be able to pre-empt a state regulatory commission where the ability of the cooperative to repay its federal loan is seriously compromised. This declination spawned another federal lawsuit which culminated in the decision of the Seventh Circuit Court of Appeals reported as *Wabash Valley Power Ass'n. Inc. v. Rural Electrification Administration*, 988 F.2d 1480 (7th Cir. 1993).

The Seventh Circuit entertained an appeal from a district court decision published at 773 F. Supp. 1178 (S.D. Ind. 1991). The Seventh Circuit met the issue the Indiana Supreme Court had declined to address. The Seventh Circuit held that the REA did not have the authority to issue regulations pre-empting the

state regulatory commission. The court acknowledged that the Indiana Supreme Court had clearly established the "used and useful rule." The court opined that the security for this loan, given the vicissitudes of the regulated utility industry, should have been a guarantee of the loans by the "customers, whose promise to buy power [is] the real security for the debt." 988 F.2d at 1491.

THE PRIOR REVERSAL

This discussion deals specifically with IP 91-928 and 91-929. These are the appeals from the bankruptcy court's affirmance of the Wabash Valley plan and the rejection of the two REA plans. The remaining cases on appeal depend upon findings of this Court in these two appeals. The initial discussion is of the new plans, that is, new from the time this Court last looked at this case.

Most of the basis of the reversal of the bankruptcy court's approval of the first Chapter 11 plan was that the bankruptcy court had failed in its valuation analysis of Wabash Valley to include the possibility that Wabash Valley might be able to recover some of its Marble Hill debt with a rate increase of a more moderate nature than the 51% that was rejected. This Court noted that the Public Service Commission had in fact invited such an attempt. This failure was at the center of the bankruptcy court's analysis of the willing buyer-willing seller valuation.

The bankruptcy court over emphasized the risk to a willing buyer. It assumed without considering evidence on the subject that the all-requirements contracts were voidable on the granting of a large rate increase. The court concluded that even if a rate increase were available to pay the debt the customers

of Wabash Valley might be able to break their contracts to purchase power, thus making a willing buyer wary and lowering the value of Wabash Valley.

This Court included also in its reasons for reversal a failure of the bankruptcy court to consider the Government's mid-level valuation. Again, this Court's concern was the failure of the bankruptcy court to take into account in its valuation the possibility that part of the debt could be recouped by a lesser rate increase. This Court found it erroneous for the bankruptcy court to assume that no rate increase at all was possible and thus no amount of the debt could be paid through any kind of rate increase.

These were the major faults that this Court found with the bankruptcy court's opinion. This Court did have some difficulty with Wabash Valley's inability to produce a tariff which would allow the REMC customers to wheel power over NIPSCO's lines and thus have an alternative source of power should the all-requirements contracts be declared null and void. This ability to wheel power would eliminate an increase to the valuation of Wabash Valley as the only source of power for its members. The bankruptcy court did nothing more than assume the tariff's existence, thus contributing to its valuation errors.

EFFECT OF NEW CASE LAW ON PLAN ON APPEAL

Since the time of this Court's 1990 reversal of the bankruptcy court, both the Indiana Supreme Court and the Seventh Circuit have spoken as outlined above. The impact of these decisions on this appeal is as follows: The valuation of the debtor which does not include the possibility of a rate increase to pay the Marble Hill debt is not only the proper approach under Indiana and federal law, it is the only approach.

After the decision of the Supreme Court of Indiana that Marble Hill was never used or useful, and the Seventh Circuit decision that federal regulations could not trump the used and useful rule, one need no longer speculate on the ability of Wabash Valley to pay the REA. It can not.

Because both of the evaluations offered by the REA in this Chapter 11 plan review depend upon ratepayers at one level or another providing funds for the repayment of this debt, and because Wabash Valley's evaluation correctly acknowledges that it can not raise rates to repay the debt, the Wabash plan becomes the only plan for further consideration by this Court.

This Court finds that the bankruptcy court properly applied, unlike the last time, the willing buyer/willing seller valuation. The valuation of the bankruptcy court is between, in this Court's view, the incorrigible optimism and confirmed pessimism warned against in *Estate of Tully v. United States*, 41 A.F.T.R.2d (P-H) ¶ 148,219, at 78-1477, 1978 WL 3453 (Ct. Cl. 1978).

As this Court has concluded above, once a determination is made that no rate increase can be achieved to pay the REA debt, and that no funds are in existence nor are likely to be in existence from ratepayers to discharge the debt, the necessity of consideration of a plan that includes a rate increase to pay this debt dissolves. Other problems that plagued the first plan disappear. The need to be concerned with the issues surrounding the possible breaking of the all-requirements contracts in the event of a large rate increase likewise disappears. There will be no increase to call into question those contracts. Additionally, the problem with the tariff disappears

because the existence of a tariff goes to the economic decision on the part on the customers as to whether to break the all-requirements contracts or not.

The REA argues that the bankruptcy court cannot make and accept an evaluation of Wabash Valley in a lesser amount than one which "includes the value" of this debt. This argument assumes that the debt somehow is collectable. The REA continues to think of the debt as Wabash Valley's account receivable. However, once the Indiana Supreme Court decided that this debt could not be collected by a rate increase and once the Seventh Circuit decided that the REA could not raise the rate by any sort of preemption, the debt could hardly be considered a valuable account receivable.

REA'S ABSOLUTE PRIORITY ARGUMENT RETAINED PROPERTY

The REA in an attempt to convince this Court that the plan which has been approved by the bankruptcy court should be disapproved invokes the absolute priority rule. The absolute priority rule forbids a bankruptcy court from forcing on a senior creditor a plan which allows a junior creditor to retain property. That is, the REA avers that this plan cannot be affirmed because the REA did not consent to any interest junior to its own receiving and retaining property under the plan.

The controversy is whether the right to future payments of the membership capital accounts of the member customers of Wabash Valley violates the absolute priority rule since the claims of the member customers are classified in the plan as inferior to the claim of the REA. The record reflects that the members of Wabash have an unsecured claim to

patronage accounts of some $7.2 million. These are the Class 11 claims. The Wabash plan provides that these "shall be reduced by the same amount as unsecured claims of REA and CFC in Class 10 are not paid. Any remaining amounts are to stay on the debtor's books and be paid pursuant to its by-laws."

The REA argues also that Wabash Valley has refunded money to its membership even in the face of this debt. The "excess margins" that these monies represent should have been paid to the REA, it says. These are patronage capital amounts that have been paid during the pendency of the bankruptcy. Wabash Valley admits that it has refunded "excess margins" to its customers. It does so, it says, as it is obligated to by Indiana law.

The point for Wabash Valley is that under Indiana law the rate payer pays only for the cost of the fuel produced. Any amount paid over that does not belong to the utility, it belongs to the members or the consumers. I.C. 8-1-2-42 (d) (3) states clearly that while a fuel adjustment charge may be applied for by the utility to properly reflect the cost to produce or provide the power to the consumer, "if the fuel charge applied for will result in the electric utility earning a return in excess of the return authorized by the commission [the funds REA wants applied to its loan], in the last proceeding in which basic rates and charges of the electric utility were approved, the fuel charge applied for will be reduced to the point where no such excess of return will be earned." Thus, the statute makes it impossible to impress these funds. I.C. 1971 8-1-2-42(e) gives the Public Service Commission the authority to suspend the rule should an emergency exist that could result in an abnormal change in fuel costs. In such case, the Commission

may do what is necessary to protect the public and the utility from harm. The public presumably is the rate payer, not the federal taxpayer or the REA.

I.C. 8-1-2-42 (d) (3) requires any overpayments to be paid back to the customer, and thus creates a statutory obligation on the part of Wabash to repay its member consumers any amounts collected above and beyond the actual amounts needed to produce power. Nothing in the supply contracts trumps that notion. That statute creates a right to repayment, or repayment's equivalent, reinvestment in Wabash. If, as has been decided by the Indiana Supreme Court, a rate increase to pay the REA is impermissible because Marble Hill was never used to produce power, the use of overpayments from past years to pay that same debt is likewise impermissible. These overpayments are not "property" of the debtor for purposes of the absolute priority rule any more than past payments or refunds are preferential transfers. Thus, it cannot be said that the retention by the Class 11 debtors of a right to a portion of the patronage capital is a retention of property in violation of the absolute property rule.

The bankruptcy court agreed with Wabash that these monies are not cash assets available for payment of REA's debt. The plan reduces the "patronage capital" in direct proportion to the lack of payment of REA's debt, so that under the plan these amounts are not returned completely, as would otherwise be the case.

The REA argues that the power supply or "all-requirements" contracts obligate the consumer members of Wabash Valley to pay the debt. This Court disagrees. The power supply contracts do not fix a rate at which the members buy power from Wabash.

The members are committed to pay a rate set by the Indiana regulating authority, designed to allow the REA debt to be paid specifically as a "cost to produce." Again, since the rate can be set, pursuant to the Indiana Supreme Court's directive, only for used and useful projects that result in the production of power, thus defining the contractual term "cost to produce", the supply contract does not bind the members to pay the REA.

The customer members are said by the REA to have retained other property. That property is the right to maintain an association that will provide power to themselves at the cost of producing that power which more likely than not is less than the price available from any other source. It is true that right relieves each member from having to worry about where its next kilowatt will come from. Yet, that right does not guarantee a particular price. The REA does not suggest that there is a market for that right such that the right to buy power from Wabash would have an ascertainable price. There is no evidence in this record that one member could sell its right to buy electricity from Wabash Valley to any entity. Without that evidence it is difficult to call a member's right to buy electricity from Wabash Valley property. This Court declines the invitation of the REA to do so. This Court holds that such a right is not property for purposes of the absolute priority rule.

In addition, what Wabash Valley's members have retained is the right over time to adjustments in their rates based on prepayments. No refund, as was rejected by *Eastern Maine Electric Cooperative, Inc.*, 125 B.R. 329, 332 (Bky. D. Me. 1991), is available under this plan. No immediate cash redemption is

contemplated by this plan as was rejected by *In Re: Axvig*, 68 B.R. 910, 916-17 (Bk. D. N.D. 1987). These amounts, then, limit the future revenues of Wabash Valley. They are appropriately listed as adding to the current value of the debtor for purposes of determining fair market value, yet these funds are not available for execution on the debt of REA, nor can assets be considered as equity for purposes of the absolute priority analysis.

The REA argues further that because the members will own and control 100% of Wabash Valley, they thus retain property. The property is that 100% control and ownership. The plan approved by the bankruptcy court provides that the members' interest in any property of Wabash Valley is cut off. The relationship between the members and Wabash Valley is to be governed only by the supply contracts and not by any relationship otherwise controlled by the plan. What the members will retain under this plan is the right to purchase power through the Wabash Valley Cooperative.

To summarize, the REA has argued that there is a remaining economic value unrecognized by the bankruptcy court that is retained by the members of Wabash Valley and that that retained value violates the absolute priority rule. That value is represented by the overpayment of power costs in the past, referred to as "overpayments," "excess margins," and "patronage capital." These terms are interchangeable. This Court holds that for the reasons set out above these amounts are not "property" the retention of which is prohibited by the absolute property rule. Additionally this Court holds that the right to buy electricity does not amount to prohibited property. Thus, this Court finds that the Chapter 11 Plan af-

firmed by the bankruptcy court does not provide for the retention of value by a class of debtors lower than that class which did not approve the proposed plan.

FAIRNESS

The underlying concern of the absolute priority rule is the fairness of a plan. The REA argues that this plan is unaffirmable because it is simply not fair. This absolute priority argument is an attempt to circumvent the effect of the decisions of the Seventh Circuit and the Indiana Supreme Court. The REA cannot accept the effect of the decisions of both upper courts that a plan can not include a rate raise to pay this debt. It holds on to the argument that any plan that does not provide for payment of its debt through a rate increase is simply not fair. It is too late in this Court's opinion to make that argument. This Court in a bankruptcy appeal does not sit as the appeals court for decisions either of the Seventh Circuit or the Indiana Supreme Court.

Both sides cite *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988). That case at page 202 tells this Court that the theory of the absolute priority rule is to ensure that the reorganization plan be "fair and equitable." What is fair and equitable in each instance depends upon what the courts and the legislators, both state and federal, have said. It seems to this Court that the upper courts together with the State legislature have defined what is fair in this case.

The REA reminds this Court that many courts have said that no debtor should profit from a bankruptcy. This is a common thought expressed when assessing the essence of the absolute priority rule as well as a general tenet of bankruptcy theory. No

citation is really necessary to establish that proposition. The REA argues that by approving a plan which washes the REA debt this court would allow Wabash to profit from the bankruptcy.

Wabash Valley is not an ordinary debtor. Wabash Valley is a regulated not-for-profit corporation. The price it can demand for its service is limited by the Public Service Commission's idea of the cost to produce its product, electric power. It does not itself know what its costs will be from year to year. When it overestimates its costs and charges customers accordingly, it must reimburse those funds in some manner. Thus even its excess margins are regulated as discussed above.

Just as there are no unregulated funds now available to pay the REA debt, there is no way for Wabash Valley to profit from its Chapter 11 experience in the classic profiting sense of being able to make money and keep it for itself to do with as it wishes. Wabash Valley can be said to profit from the Chapter 11 bankruptcy in the sense that it does not have to pay the REA. Yet the nonpayment of the debt is not the voluntary decision of Wabash Valley or its members or of a lower class of debtors than Wabash Valley's members. Thus even though the statutes and rulings which will not allow a rate increase to pay this debt still appear unfair to the REA, and this Court can certainly understand the disgruntlement of being left with a colossal debt and nowhere to turn, the absolute priority rule will not yield the result sought by the REA.

CONCLUSION

The concerns of this Court in the reversal of the previous plan have been met by the new plan. The impact of the new case law is dispositive. These rulings would have to be ignored in order for the absolute priority rule to be imposed for the benefit of the REA. The Court therefore affirms the judgment of the bankruptcy court. In affirming the bankruptcy court's confirmation of the plan, the Court also affirms the bankruptcy court's denial of the plans offered by the REA. This Court's ruling also necessarily finds against the REA and in favor of the debtor in cause IP-91-930 on the issue of an automatic stay. This opinion also decides cause number IP-93-1551. The Court finds for Wabash Valley and against the REA on the issues raised in that appeal for the same reasons set out in this decision. Additionally, an acknowledgement by this Court of the Indiana Supreme Court's ruling that the Marble Hill debt cannot be repayed from a rate increase and a finding by this Court that the debt cannot under Indiana law be repaid from member overpayments effectively finds for Wabash Valley and against the REA in cause number 1P-9T-1301.

The REA's motion to withdraw reference in cause number 1P 92-1468 is overruled. The decision in the appeal in IP-91-928 and IP-9l-929 controls here also. In addition, a different bankruptcy judge is now sitting in these cases. All pending appeals are now decided.

IT IS SO ORDERED this 28th day of June, 1994.

/s/ LARRY J. McKINNEY, JUDGE
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Distribution to: [Omitted]

APPENDIX C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Case No. 85-2238-RWV-11

IN RE: WABASH VALLEY ASSOCIATION, INC., DEBTOR.

[Aug. 7, 1991]

ORDER CONDITIONALLY CONFIRMING WABASH VALLEY POWER ASSOCIATION, INC.'S THIRD RESTATED FOURTH AMENDED PLAN OF REORGANIZATION

Wabash Valley Power Association, Inc. ("Debtor"), having filed its Third Restated Fourth Amended Plan Of Reorganization ("Plan") on August 23, 1990, under Chapter II of the United States Bankruptcy Code ("Code"), the Plan having been duly transmitted to creditors and parties in interest, objections to said Plan having been filed by various parties, the Court having conducted a hearing on the Plan and the objections thereto following due notice, and the Court having contemporaneously herewith entered its Findings Of Fact And Conclusions Of Law that:

1. The Plan complies with the applicable provisions of the Code;

2. The Debtor has complied with the applicable provisions of the Code;

3. The Plan was proposed in good faith and not by any means forbidden by law;

4. A. Any payment made or promised by the Debtor, or by any persons issuing securities or acguiring property under the Plan, for services or for costs and expenses in, or in connection with, the case, or in connection with the Plan and incident to the case, have been disclosed to the Court; and

B. Any such payment made before confirmation is reasonable, or if such payment is to be fixed after confirmation of the Plan, such payment is subject to the approval of the Court as reasonable;

5. A. The Debtor has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the Plan, as a director, officer or voting trustee of the Debtor, an affiliate of the Debtor participating in a joint plan with the Debtor, or a successor to the Debtor under the Plan, and the appointment to, or continuance in, such office of such individual, is consistent with the interest of creditors, eguity security holders and with public policy;

B. The Debtor has disclosed the identity of any insider that will be employed or retained by the reorganized Debtor, an the nature of any compensation for such insider;

6. The Plan is expressly conditioned upon approval by any regulatory commission with jurisdiction, after confirmation of the Plan, over the rates of the Debtor, which approval has not yet been obtained;

7. With respect to each class, each holder of a claim or interest of such class has accepted the Plan, or will receive or retain under the Plan on account of such claim or interest property of a value, as of the effective date of the Plan that is not less than the amount that such holder would receive or retain if the Debtor were liquidated under Chapter 7 of the Code;

8. The Plan has been accepted in writing by the classes of creditors or equity security holders whose acceptances are required by law or the Plan does not discriminate unfairly and is fair and equitable with respect to each class of claims or interests that are impaired under, and has not accepted the Plan;

9. The Plan properly deals with creditors having claims under 11 U.S.C. Sec. 507(a);

10. At least one class of claims has accepted the Plan, determined without including any acceptance of the Plan by any insider holding a claim of such class;

11. Confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtor or any successor to the Debtor under the Plan;

12. All bankruptcy fees owed pursuant to 28 U.S.C. Sec. 1930 have been paid or are to be paid following confirmation of the Plan;

13. Retiree benefits are to continue after the effective date of the Plan, in compliance with 11 U.S.C. Sec. 1114. Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Plan filed by Wabash Valley Power Association, Inc., on August 23, 1990, be and hereby is, confirmed conditioned upon the approval of such rates as is required by the Plan and 11 U.S.C. Sec. 1129(a)(6), and the Debtor shall file with this Court evidence that such regulatory approval has been obtained, at which time this Order shall become unconditional.

At such time as this Order becomes unconditional, IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

1. that except as otherwise provided in 11 U.S.C. Sec. 1141 or in the Plan, this Order discharges the

Debtor from any debt that arose before the date of such confirmation and any debt of a kind specified in 11 U.S.C. Sec. 502(g), 502(h), or 502(i);

2. that pursuant to 11 U.S.C. Sec. 524, the discharge effected by this Order:

A. Voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the Debtor with respect to any debt discharged under 11 U.S.C. Sec. 1141, whether or not discharge of such debt is waived; and

B. Operates as an injunction against the commencement or continuance of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the Debtor, whether or not discharge of such debt is waived.

3. that, except as otherwise specifically provided in 11 U.S.C. Sec. 1141, the provisions of the Plan bind the Debtor, any entity acquiring property under the Plan, and any creditor or equity security holder, whether or not the claim or interest of such creditor or equity security holder is impaired under the Plan and whether or not such creditor or equity security holder has accepted the Plan;

4. that, except as otherwise provided in the Plan, all property of the estate, tangible or intangible, be, and hereby is, vested in the Debtor;

5. that, except as otherwise provided in 11 U.S.C. Sec. 1141 or in the Plan, the property dealt with by the Plan is free and clear of all claims and interests of creditors and equity security holders;

6. that, except as otherwise provided in the Plan, the Debtor shall retain and remain in possession of all causes of action as the Debtor may have under the Code or any other laws; and

7. that the Debtor and any other person or entity deemed by the Debtor to be necessary, shall prepare and/or join in the execution or delivery or performance of any instrument or document that the Debtor deems necessary, helpful or appropriate to effect a transfer of property or an adjustment of rights in property or the granting, satisfaction, or termination of any lien dealt with by the Plan or this Order that is necessary for the consummation of the Plan.

DATED, at Indianapolis, Indiana, this 7th day of August, 1991.

/s/ RICHARD W. VANDIVIER
RICHARD W. VANDIVIER, JUDGE
UNITED STATES BANKRUPTCY JUDGE

DISTRIBUTION:

See Attached.

DISTRIBUTION OMITTED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Case No. 85-2238-RWV-11

IN RE: WABASH VALLEY ASSOCIATION, INC., DEBTOR.

[Aug. 7, 1991]

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CONFIRMATION OF DEBTOR'S THIRD RESTATED FOURTH AMENDED PLAN OF REORGANIZATION AND DENYING CONFIRMATION OF REA'S PLAN

This Court having considered, upon full evidentiary hearings and argument of counel, the matters above captioned, the following is presented as procedural narrative:

I. PROCEDURAL HISTORY

Wabash Valley Power Association, Inc., the Debtor herein ("Wabash" or "Debtor"), has requested the Court to confirm its Third Restated Fourth Amended Plan of Reorganization ("Wabash Plan") filed on August 23, 1990. The Wabash Plan is a cumulative version of Wabash's Fourth Amended Plan Of Reorganization filed on June 12, 1989, including all amendments, restatements and modifications thereto Wabash's Disclosure Statement was approved by the Court on October 19, 1989. Following due notice of a confirmation hearing on Wabash's Restated Fourth Amended Plan Of Reorganization, filed on October 20, 1989, objections were filed by the Rural Electrification Administration ("REA"), National Rural Utili-

ties Cooperative Finance Corporation ("CFC"), Fruit Belt Electric Cooperative ("Fruit Belt") and the Indiana Utility Consumer Counselor ("IUCC"). As a result of said objections, Wabash filed a Second Restated Fourth Amended Plan on December 6, 1989, and also filed a Response to said objections on December 11, 1989.

In addition, REA has requested the Court to confirm its (Restated) First Amended Plan Of Reorganization ("REA Plan") filed on November 13, 1989. Objections to the REA Plan were filed by Wabash, the Official Members' Committee, Fruit Belt, the IUCC, the State of Michigan and the Michigan Public Service Commission ('MPSC").

Beginning on December 11, 1989, and continuing on January 3 through January 5, 1990, the Court conducted a consolidated confirmation hearing on Wabash's Second Restated Fourth Amended Plan and the REA Plan. At the hearing, the IUCC withdrew its objections to Wabash's Second Restated Fourth Amended Plan. On January 19, 1990, prior to a decision on confirmation, the District Court reversed and remanded this Court's 1987 decision finding Wabash's going concern value to be $212,055,000.00. *National Rural Utilities Cooperative Finance Corp. v. Wabash Valley Power Ass'n., Inc.*, 111 B.R. 752 (S.D. Ind. 1990), *rev'g and rem'g*, 77 3.R. 991 (Bankr. S.D. Ind. 1987) (Sufana, J.) (the "Valuation Case"). As a result of the District Court's decision, on June 12, 1990, the Court issued notice that a continued confirmation hearing and remanded valuation hearing would commence on September 24, 1990.

Beginning on September 24, 1990, and ending on October 10, 1990, the Court conducted a continued confirmation hearing on the Wabash and REA Plans

and a remanded valuation hearing. Only Wabash and REA presented evidence at the hearing. The parties agreed that the transcripts and evidence from the 1987 valuation hearing and January, 1990 confirmation hearing should be included as evidence in this proceeding. References to the 1987 valuation hearing transcript will be denoted by "Val. T. ____, p. ____." References to the January, 1990 confirmation hearing transcript will be denoted by "Conf. T. ____, p. ____." References to the September, 1990 continued confirmation hearing and remanded valuation hearing transcript shall be denoted by "C/V T. p. ____." Unless otherwise indicated, all capitalized terms used herein shall have the meanings assigned to them in the Wabash Plan or the REA plan.

II. SUMMARY OF ISSUES

The three overriding issues for the Court are: (1) what is the fair market value of Wabash as a going concern for purposes of 11 U.S.C. §§ 506(a) and § 1129(b); (2) whether the Wabash Plan is confirmable under 11 U.S.C. § 1129; and (3) whether the REA Plan is confirmable under 11 U.S.C. (1129. Only if both Plans are confirmable must the Court consider which Plan to confirm under 11 U.S.C. § 1129(c).

A. VALUATION ISSUE AND REMAND DECISION

The valuation issue is back before the Court because of the District Court's remand in the Valuation Case. Although the District Court did not preclude a going concern value in the low $200 million range, and it did not disturb the finding that REA's $864 million

valuation is excessive,[1] it was critical of this Court's perceived failure to adequately apply the "willing seller" aspect of the willing buyer-willing seller valuation standard, and to reasonably estimate certain risks which affect Wabash's going concern value. 111 B.R. at 776.[2] The two risks specifically identified by the District Court were (i) whether Wabash could obtain any level of rate increase from the Indiana Utility Regulatory Commission ("IURC") to recover any portion of the Marble Hill debt, and (ii) whether the power supply contracts between Wabash and the Members are legally enforceable. 111 B.R. at 756. On remand, substantial evidence was offered on these two issues, and the Court has carefully considered such evidence.

Wabash and REA have again presented vastly different appraisals of Wabash's going concern value. Whereas Wabash's experts testified that the fair market value of Wabash as a going concern value is $190 million,[3] REA's expert opined that the value is

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[1] The District Court also left undisturbed this Court's findings on the appropriate inflation rate and discount rate. 111 B.R. at 776.

[2] The District Court also criticized this Court's perceived falure to consider REA's Case A-1 scenario which was based on annual 4% rate increases resulting in a value of $495 million. On remand, REA has altered the assumptions and value conclusion of its scenario 1 valuation, which are considered by the Court herein; therefore, this error is essentially moot.

[3] As discussed herein, although Wabash presented evidence that its going concern value determined by the traditional willing buyer-willing seller standard is $190 million, it also presented evidence that Wabash would remain the most viable power supply option for the *Members* so long as the going concern value does not exceed $221.7 million.

either $450 million or $750 million depending on whether the regulatory body is the IURC or the REA. Thus, from the reams of evidence submitted by the parties and consistent with the District Court's directives, the Court must reconsider the issue of Wabash's fair market value as a going concern.

B. SUMMARY OF THE WABASH PLAN

The Wabash Plan proposes to pay approximately $457 million to creditors, including nearly $431 million to REA (which equals roughly 65% of REA's prepetition claim). The amount to be paid to creditors would come from three primary sources: (1) $221.7 million from rate revenues paid by the Members; (2) $185 million from settlements reached in the Marble Hill litigation; and (3) approximately $50 million from various cash accounts. The Wabash Plan further provides that the Supply Contracts shall be assumed, and that the Members shall continue to elect the Wabash Board. Confirmation of the Wabash Plan would be conditional upon the IURC and MPSC approving a revenue increase to pay the $221.7 million. *See* 11 U.S.C. § 1129(a)(6).

Because REA and CFC rejected the Wabash Plan, Wabash has requested that its Plan be confirmed under the "cram down" provisions of § 1129(b). Based on REA's objections to the Wabash Plan and the evidence introduced at the hearing, the major subissue under the broader issue of confirmation is whether the Wabash Plan satisfies the absolute priority rule with respect to the class containing the unsecured claims of REA and CFC.

The absolute priority rule is at issue because, although the unsecured claims of REA and CFC are not paid in full under the Wabash Plan, the Plan

allows the Members to retain control over Wabash. The Wabash Plan proposes to satisfy the absolute priority rule by basing the Members' retention of control on: (i) the fact that the Supply Contracts being assumed by Wabash require such control and (ii) the fact that this is not a typical cram down case where equity holders may receive some economic value to the detriment of unsecured creditors. While the Wabash Plan proposes to satisfy the absolute priority rule, it also requires the Members to make fresh capital contributions that satisfy the new capital exception to the absolute priority rule.

C. SUMMARY OF THE REA PLAN

Under the REA Plan, REA would preempt the IURC and the MPSC as the regulatory authorities with jurisdiction over Wabash's rates, and the secured creditors (i.e., REA and CFC) would be issued stock entitling them to elect the Wabash Board. Assuming that REA can gain control over both the regulation of Wabash and the Wabash Board, the REA Plan provides that Wabash's rates shall be increased to the extent necessary to pay REA and CFC in full, including post-petition and post-confirmation interest. Thus, the REA Plan provides that REA and CFC shall receive payments over the next 37 years having a present value of more than $1 billion. If the payments are not made, the REA Plan provides that Wabash shall be liquidated (in fact, under the REA Plan, the REA-controlled Board may liquidate Wabash at any time for any reason).

In spite of the dramatic changes in regulation and Board control proposed in the REA Plan, the REA Plan provides that the Supply Contracts shall be assumed. Although Wabash and others have filed

many objections to the REA Plan, the most serious issue is whether confirmation of the REA Plan would breach the Supply Contracts, freeing the Members to purchase power elsewhere.

II. UNIQUE FACTORS DISTINGUISHING THIS CASE.

Further complicating these already complex valuation and confirmation issues, and distinguishing this case from other Chapter 11 cases, are the following unique factors: (1) Wabash is a not-for-profit cooperative organized to reduce costs for its Members — *not* a typical Chapter 11 corporation organized to earn profits for its shareholders — which means that, as a matter of state law, Wabash's Members may not receive dividends during the life of Wabash, or receive any distribution upon the liquidation of Wabash; (2) Wabash is a regulated public utility which is required to provide wholesale electricity to its 24 Members at rates that do not permit any profit and that must correspond with the actual services provided by Wabash; and (3) the Supply Contracts that hold Wabash and the Members together provide the Members with substantial rights and control over Wabash, including the right to elect Wabash's Board of Directors and the right to set rates subject to IURC approval.

The Court having considered the objections to the Wabash and REA Plans, the evidence submitted by the parties, the post-hearing filings and arguments, and the entire record, now makes its Findings Of Fact and Conclusions Of Law pursuant to Bankruptcy Rules 9014 and 7052:

FINDINGS OF FACT

I. BACKGROUND[4]

1. Wabash filed its Chapter 11 petition on May 23, 1985 (the "Petition Date").

2. Wabash is a not-for-profit, generation and transmission electric cooperative ("G & T"), formed in 1962 under the Indiana Not-For-Profit Corporation Act, I.C. §§ 23-7-1-1 *et seq.* (now I.C. §§ 23-7-1.1-1 *et seq.*). Conf. T. I., p. 14-15, 19, 21.

3. Because Wabash is a not-for-profit cooperative, it is eligible for tax-exempt status under 26 U.S.C. § 501(c)(12). Although Wabash was not tax-exempt in 1989 because its non-member revenue exceeded 15% of total revenues, Wabash anticipates that it will regain its tax exempt status for 1990 and beyond. Conf. T. I., p. 67-69.

4. As a not-for-profit corporation, Wabash is not permitted to pay any earnings or dividends to its Members and, upon a dissolution of Wabash, any surplus assets remaining after the payment of debts and the return of capital contributions escheat to the State of Indiana. *See* I.C. §§ 23-7-1.1-4(c), 14(a), and 33(b)(3)(E).

5. Edward P. Martin ("Martin") has been the general manager of Wabash since 1976. Martin has an undergraduate degree in electrical engineering and an MBA from Indiana University. Conf. T.I., p. 12.

6. Wabash provides wholesale electric energy and other services to 24 rural electric distribution cooperatives (the "Members"), 22 of which are located in

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[4] A complete recitation of the historical facts is found at 77 B.R. 991, 992-1000 and at 111 B.R. 752, 756-58.

northern Indiana, one of which is located in Michigan (Fruit Belt), and one of which is located in Ohio (Paulding-Putnam). Conf. T. I., p. 15; Dr. Ex. D. The 22 Members located in Indiana are rural electric membership cooperatives formed pursuant to the Indiana Rural Electric Membership Corporation Act, I.C. §§ 8-1-13-1 *et seq.* Conf. T. I., p. 15.

7. Historically, Wabash has approved membership for any electric distribution cooperative that filed an application and paid a $5.00 fee. Conf. T. I., p. 22-23. Recently, the Wabash Board passed a resolution continuing this policy, provided that the applicant agrees to make the same financial contributions required of the current Members under the Wabash Plan. Conf. T. I., p. 26-28; Dr. Ex. B.

8. Wabash's Members serve approximately 400,000 retail customers in northern Indiana and southwestern Michigan. Wabash's business is predominantly residential. Conf. T. I., p. 21. Each Member is a not-for-profit corporation owned and controlled by its customers, the retail buyers of electricity. Val. T. I., p. 76-77.

9. Wabash is governed by a Board of Directors elected by the Members and comprised of one nominee from each of the 24 Members. Conf. T. I., p. 14-15. This is consistent with Wabash's By-laws, requiring that the Wabash Board consist of a representative from each Member. Dr. Ex. H.

10. The individuals serving as Wabash's directors are identified in Article X of the Wabash Plan. Martin identified Wabash's principal officers at the January confirmation hearing. Conf. T. I., p. 16. The only compensation received by Wabash's officers and directors is $200.00 per meeting attended. Conf. T. I., p. 17-18.

11. Wabash maintains a patronage capital account for each Member, which is based on the total sales to each Member. The patronage capital generally represents the amount of money earned by Wabash over and above its required expenditures. Conf. T. I., p.23. Although repayment of the patronage capital is at the discretion of the Wabash Board, Wabash considers the patronage capital to be a debt obligation. Conf. T. I., p. 24. As of the Petition Date, the total amount of patronage capital owed to the Members was $7,184,740.07. Dr. Ex. C.

12. When Wabash was formed in 1962 it had 21 Members, and its sole source of income was dues paid by the Members. The purpose of Wabash was to provide the Members with a reliable and reasonably priced wholesale power supply. Through 1976, when Wabash hired Martin, Wabash was still not supplying electric power to the Members, and its capitalization was only $100,000.00. Val. T. I., p.47-50.

13. Before Wabash began supplying the Members with electric power, the Members received their power directly from one of four investor owned utilities ("IOUs"): Northern Indiana Public Service Company ("NIPSCO"), Indianapolis Power & Light Company ("IPL"), Public Service Company of Indiana, now known as PSI Energy, Inc. ("PSI") and Indiana & Michigan Electric Company, now known as Indiana Michigan Power Company ("I & M"). Each Member generally bought power from the IOU located closest to it. Val. T. I., p. 51-89; WVPA Exs. 1-6.

14. In 1977, Wabash entered into wholesale power supply contracts (the "Supply Contracts") with each of the Members, that provide that the Members will purchase all of their requirements for electric power from Wabash for a 40-year term (later extended by 10

years). Val. T. I., p. 91. In 1978, the Members assigned their existing power supply contracts with the four IOUs to Wabash, although IPL has never recognized the assignment and I & M only assented to the assignment after Wabash filed an action with the FERC. Val. T. I., p. 89-99. Energy is physically transferred to the Members today in the same manner as when the Members purchased directly from the four IOUs; the only changes have been contractual. Val. T. I., p. 89.

15. The Supply Contracts further provide that (1) Wabash's rates shall produce revenues which shall be sufficient, but only sufficient, to pay operating expenses, taxes, principal and interest, and to provide for reasonable reserves; (2) the Wabash Board (which is elected by the Members) must pre-approve all rate requests; and (3) all rate requests are "subject to the approval of the Public Service Commission of Indiana." Dr. Ex. A, ¶ 4. These provisions are consistent with the relevant Indiana statutes and Wabash's Articles of Incorporation and By-laws.

16. Although the Supply Contracts were derived from an REA form contract, the provisions making all rate requests subject to the approval of the Public Service Commission of Indiana is *not* a standard REA provision. Conf. T. I., p. 34-36. In fact, REA is unaware of any other wholesale power supply contract securing REA loans which includes such a specific reference to a state regulatory body's approval of rates. C/V T. p. 1418. [The Supply Contracts are discussed in more detail under section IV. A. 2., *infra*.].

17. With the exception of Fruit Belt, the rates which Wabash charges the Members are regulated by the IURC, formerly known as the Public Service Commission of Indiana. The MPSC regulates the

rates charged to Fruit Belt. Val. T. I., p. 164-65. [Unless otherwise indicated, references to the IURC or the state commission(s) include the MPSC to the extent applicable.]

18. Wabash's last general rate case was in 1983. Conf. T. I., p. 50. In the 1983 rate case, the IURC set Wabash's rate level and established a capital reserve of approximately $3.2 million for extensions and replacements to plant. Conf. T. I., p. 51. If the rates approved by the IURC produce revenues exceeding Wabash's expenses and the capital reserve, the excess revenues are referred to as "cash margins" or "excess margins." Wabash has been experiencing excess margins since the Petition Date. Conf. T. I., p. 52. The IURC requires Wabash's excess margins to be applied as a credit against increased fuel cost charges to the Members. Conf. T. I., p. 52-54. Wabash's attorneys' fees and litigation costs are treated as operating expenses which serve to reduce the amount of excess margins, thereby reducing the available credit against fuel cost charges. Conf. T. I., p. 54. The net effect is that the Members pay Wabash's legal expenses and the payments do not come from funds available to pay creditors. Conf. T. I., p. 54-55; Dr. Ex. P.

19. REA, Wabash's largest creditor, was created by the Rural Electrification Act of 1935, 7 U.S.C. §§ 901, *et seq.* The Congressional purpose in creating REA was to make loans for rural electrification. Conf. T. III., p. 83. All of Wabash's loans from REA were obtained through the guaranteed loan program, whereby REA guarantees loans made by the Federal Financing Bank ("FFB"). Conf. T. I., p. 72-73; Conf. T. II., p. 84.

20. In 1978, Wabash became contractually involved with the Marble Hill nuclear power plant ("Marble Hill") being constructed by PSI. Wabash was a 17% investor in said project, and PSI owned 83%. Wabash borrowed the funds for its 17% investment in Marble Hill from FFB, and REA guaranteed said loans.[5] PSI's estimate of the total construction cost in 1978 was approximately $1.8 billion. When the project was officially cancelled in January, 1984, approximately $2.9 billion had been expended on the project, and the estimated completion cost was between $7 and $10 billion. Based on PSI's cost projections, Wabash originally estimated that its investment in Marble Hill would be approximately $360 million; however, Wabash had invested approximately $460 million by the time Marble Hill was terminated. Conf. T. I., p. 55-57.

21. Following the cancellation of Marble Hill, Wabash filed suit against PSI (and later against other Marble Hill participants) and undertook efforts to determine whether the project could be converted to a coal-fired plant or completed as a nuclear facility. Conf. T. I., p. 59. At the same time, Wabash attempted to restructure its REA loans and, at the insistence of REA, sought rate relief from the IURC for the purpose of repaying the Marble Hill debt. Conf. T. I.,

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[5] REA's policy has been to encourage electric cooperatives to invest in nuclear power plants. Speaking to Congress in 1968, former REA Administrator Norman Clapp echoed this policy by citing "the urgent necessity for providing at this time assurance of participation by all electric utilities . . ., including the electric cooperatives, in nuclear power plants planned for construction." *Participation by Small Electric Utilities in Nuclear Power: Hearings Before the Joint Comm. on Atomic Energy*, 90th Cong., 2d Sess. 114 (1968).

p. 58-59. Applying Indiana's "used and useful" rule, the IURC dismissed Wabash's petition for a rate increase and ruled that Wabash could not recover its sunk costs for Marble Hill through a rate increase. WVPA Exs. 10, 11. Ultimately, the Indiana Court of Appeals and Indiana Supreme Court affirmed the IURC's decision. *National Rural Utilities Cooperative Finance Corp. v. Public Service Commission of Indiana*, 552 N.E.2d 23 (Ind. 1990), *aff'g*, 528 N.E.2d 95 (Ind. App. 1988) (the "Rate Case").[6]

22. On April 19, 1985, after negotiations between REA and Wabash to restructure the loans failed, the United States Justice Department sent Martin and all of Wabash's directors a letter that asserted that, pursuant to 31 U.S.C. § 3713, each recipient would be held personally liable for the REA debt to the extent of any payments made by Wabash to other creditors. WVPA Ex. 14. Faced with this potential individual liability, Wabash filed its Chapter 11 petition on May 23, 1985. Conf. T. I., p. 58-59, 159.

23. As of the Petition Date, Wabash owed REA $669,058,454.25, consisting of $621,997,000.00 in principal and $47,061,454.25 in interest. Conf. T. 1., p. 69. Of this amount, approximately $540 million was related to Marble Hill and approximately $130 million was related to non-Marble Hill assets. Wabash Disclosure Statement, p. 20-21. Subsequent to the Petition Date, Wabash voluntarily paid REA $36,444,964.22, representing debt service payments on non-Marble Hill debt. Conf. T. I., p. 69. Although Wabash designated the payments to be applied to non-Marble Hill debt, REA has not recognized the distinction between

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[6] REA and CFC were allowed to intervene in, and fully participated in, the Rate Case. 528 N.E.2d at 98.

Marble Hill and non-Marble Hill debt. C/V T. p. 794-95. In June of 1988, Wabash ceased making payments to REA and, pursuant to a Stipulation and Court order, began making non-Marble Hill debt service payments to an escrow account entitled the "Timbers Account." Conf. T. I., p. 70; Conf. T. II., p. 93. On July 19, 1990, the Court entered its Judgment On Order Granting United States' Motion For Abandonment Of Monies In Escrow Account, directing Wabash to close the Timbers Account and pay the funds to REA, and directing REA to apply said funds "to the principal amount of the 'non-Marble Hill debt.'" Pursuant to such Judgment, in August, 1990, Wabash, paid REA an additional $28,928,693.22. C/V T. p. 795.

24. CFC is a not-for-profit cooperative association which provides its members with funding to supplement REA's loan program. As of the Petition Date, Wabash owed CFC $35,491,876.29. Conf. T. I., p. 72. Of this amount, $8,719,458.00 represents a loan to make a debt service payment to REA on the Marble Hill debt, and the balance represents loans to build Wabash's headquarters and to pay for pollution control facilities at Gibson Unit No. 5. Conf. T. I., p. 58; Wabash Disclosure Statement, p. 21. Subsequent to the Petition Date, Wabash paid CFC $11,845,045.00 on the non-Marble Hill loans. Wabash Disclosure Statement, p. 17.

25. The REA debt and CFC debt (excluding the $8,719,458.00 Marble Hill debt owed to CFC) are secured by a pre-petition, joint mortgage and security agreement ("REA Mortgage") covering most of Wabash's assets. REA Ex. 8.

26. PSI has filed three (3) unsecured claims against Wabash which, collectively, assert a liquidated liability in the amount of $29.5 million and a contingent

liability in an amount not to exceed $110 million. Other than a claim for indemnification in the amount of $466,017.00, all of PSI's claims are related to Marble Hill. Wabash Plan, § 2.9.

II. ASSETS OF THE ESTATE AND LIQUIDATION VALUE OF WABASH

27. In an effort to recover its investment in Marble Hill, Wabash filed suit against PSI, Sargent & Lundy Engineers ("S & L") and other defendants. Conf. T. I., p. 32-33, 61. With the exception of PSI and S & L, final settlements have been approved with all of the defendants in said litigation and the settlement proceeds received have been escrowed into the Marble Hill Contractor Escrow Account. Conf. T. I., p. 62.

28. On February 1, 1989, Wabash and PSI executed a "Memorandum of Agreement" (the "PSI Settlement"), which represents a tentative settlement of the disputes between Wabash and PSI arising out of the construction of Marble Hill. Wabash Disclosure Statement, Ex. B. This tentative settlement is contingent upon confirmation of the Wabash Plan, or some other consensual resolution of the bankruptcy case. *Id.* ¶ 24. The PSI Settlement contains numerous cash terms, power supply terms and miscellaneous terms and conditions intended not only to resolve Wabash's lawsuit against PSI, but also to settle PSI's claims against Wabash in the bankruptcy case and to lay the ground work for a 35-year power supply contract between the parties. The PSI Settlement provides, inter alia, that REA and CFC will receive payments from PSI with a present value of $170 million. Of this amount, $80 million is to be paid in cash and the remaining $90 million is to be paid by

PSI over 35 years from the proceeds generated by the power supply contract mentioned above. *Id.* ¶¶ 18-20.

29. The PSI Settlement also seeks to resolve PSI's claims against Wabash (which range from $29.5 million to $110 million) by providing, inter alia, that any plan filed by Wabash shall allow PSI's indemnification claim in the amount of $466,017.00 and treat such claim substantially the same as other unsecured claims. Wabash Disclosure Statement, Ex. B. ¶ 7. The PSI Settlement further provides that PSI will "forego" payment of its remaining claims. *Id.* ¶ 5.

30. The PSI Settlement is not binding on the parties until approved by the Court as part of an order confirming the Wabash Plan, or as part of a consensual resolution of the bankruptcy case. *Id.* ¶ 24. For several reasons, the Court finds that the Wabash Plan and PSI Settlement are interdependent, with neither capable of being approved or performed without the other. First, as demonstrated by the competing plans filed by Wabash and REA, a consensual resolution of this bankruptcy case has not been possible. Second, Section 14.4 of the Wabash Plan and paragraph 24 of the PSI Settlement expressly provide for such interdependence. Third, the underlying and fundamental premise of the PSI Settlement is that Wabash will continue in business after confirmation of its Plan and will be able to purchase power from PSI to supply the I & M area. Conf. T. I., p. 65. Finally, it is clear that when the Wabash Board approved the PSI Settlement as being reasonable, they did so only as part of a total package which would include confirmation of the Wabash Plan. Conf. T. 1., p. 67.

31. It has not been disputed, and the Court now finds, that the PSI Settlement is fair and reasonable; however, final approval of the settlement and realiza-

tion of the $170 million is contingent on confirmation of the Wabash Plan.

32. For purposes of a hypothetical liquidation analysis, the Court finds that the liquidation value of the litigation against PSI is zero because of the contingent nature of the PSI Settlement, the fact that even under the PSI Settlement $90 million is to be paid over time from PSI's sale of power *to Wabash* in the I & M area, and the unlikelihood that a Chapter 7 trustee could successfully pursue such litigation (which was filed in 1984, and has been inactive for two years).

33. The Wabash Plan also incorporates a proposed settlement with S & L (the "S & L Settlement"), which provides, inter alia, that REA and CFC shall receive $15 million from S & L within thirty (30) days after a final order is entered confirming the Wabash Plan, plus interest as provided in the agreement. REA previously stipulated to an estimated value of the S & L litigation at $20 million, Conf. T. III., p. 5-6, and no objections have been filed to the proposed settlement. Thus, the Court finds that the S & L Settlement is fair and reasonable; however, by its terms, final approval of said settlement is also contingent on confirmation of the Wabash Plan.

34. S & L is a co-defendant in Wabash's litigation against PSI. For purposes of a hypothetical liquidation analysis, the Court finds that the liquidation value of the litigation against S & L is zero because the tentative S & L Settlement is contingent on confirmation of the Wabash Plan, and it is unlikely that a Chapter 7 trustee could successfully pursue such litigation.

35. PSI has liquidated most of the tangible personal property associated with Marble Hill, and Wabash's share of the liquidation proceeds is deposited in the

Marble Hill Salvage Account. REA and Wabash have stipulated that the liquidation value of the remaining Marble Hill real estate and personal property, Marble Hill Salvage Account, Marble Hill Contractor Escrow Account, Marble Hill to Columbus Line and 765 KV Switchyard is $29,800,000.00. Dr. Ex. I. Said assets are not included in the Generation and Transmission Assets as defined in Section 1.15 of the Wabash Plan and were not part of the assets from which the going concern value was derived. The amount paid to creditors by reason of said assets would be the same in either a liquidation or under a plan of reorganization.

36. Wabash's tangible, useful assets consist of: (1) a 25% interest in Gibson Unit No. 5; (2) an ownership interest in transmission facilities; (3) distribution facilities, including substations; (4) headquarters building; (5) load management system; and (6) furniture, miscellaneous equipment and vehicles. Conf. T. I., p. 28-31. Pursuant to a stipulation between REA and Wabash, the liquidation value of said assets is $175 million. Dr. Ex. I. The book value of said assets is approximately $130—$150 million. Dr. Ex. A-10; C/V T. p. 1574, 1619. All of said assets (except vehicles) are included in the Generation and Transmission Assets as defined in Section 1.15 of the Wabash Plan, and are included in the assets from which the going concern value was derived.

37. Wabash's intangible assets consist of: (1) the Supply Contracts mentioned above; (2) capital in CFC (approximately $8 million to be set off against CFC's claim); (3) the litigation against PSI and S & L described above, and (4) various interconnection and power agreements with other utilities. Conf. T I., p. 31-33. Martin testified that in his business opinion the Supply Contracts have no independent liquidation

value because the Members effectively set the price they pay for power by virtue of their control over the Wabash Board. Conf. T. I., p. 36-38. Martin further testified that Wabash's contracts with other utilities have no liquidation value primarily because such contracts would be meaningless without Wabash in existence and could be obtained in the market directly from the utilities. Conf. T.I., p. 38-44.

38. As further evidence that the Supply Contracts have no independent liquidation value, Wabash presented the testimony of Dr. Shannon P. Pratt, whose credentials are summarized in ¶ 133 below. Pratt reviewed the Supply Contracts, along with relevant portions of the Wabash By-laws and Articles of Incorporation, to determine the fair market value of said contracts. Conf. T. I., p. 186. Pratt's expert opinion was that the Supply Contracts have no fair market value because the contracts would preclude a buyer from earning a return on his purchase. Conf. T. I., p. 87. Pratt testified that a buyer of the Supply Contracts would be unable to earn a return on his purchase for several reasons. First, the Supply Contracts provide that the seller of the electricity may not make a profit. Conf. T. I., p. 188-89, 194-95; Dr. Ex. A, 4. This is consistent with Wabash's Articles of Incorporation and Bylaws. Dr. Exs. F, G. Second, the Supply Contracts expressly provide that only Wabash's Board may request a rate change, and the Wabash Board is comprised of nominees from the Members. Conf. T. I., p. 195-96; Dr. Ex. A, 4; Dr. Ex. H. It is illogical to believe that a buyer would pay any significant amount for the Supply Contracts since the customers have the right to establish the rates. Third, the Supply Contracts provide that all rate changes are subject to the approval of the IURC.

Conf. T. I., p. 196; Dr. Ex. A, ¶ 4. Under IURC regulations, excess margins are credited against increased fuel cost charges to the Members. Dr. Ex. P. Based on his analysis, Pratt found that the Supply Contracts "have no separate value outside of the value of Wabash as a going concern." Conf. T. I., p. 199.

39. Dr. Wilbur G. Lewellen, whose qualifications are summarized in 175 below, also testified that the Supply Contracts are "worth nothing" because "[t]here is no rational reason for anyone to buy them." Conf. T. II., p. 20. Lewellen stated that the Supply Contracts have no liquidation value because the Members are able to control the price which they pay for power. Conf. T. II., p. 19-20.

40. REA offered no evidence that the Supply Contracts or Wabash's contracts with other utilities have any independent liquidation value. The testimony of Martin, Pratt and Lewellen on this valuation issue stands unrebutted. The Court finds that the Supply Contracts and Wabash's contracts with other utilities have no independent liquidation value, and that their value is only reflected in the value of Wabash as a going concern.

41. The only Wabash asset not previously mentioned is cash in the Investment Accounts (approximately $19 million) and cash maintained for Operating Funds (approximately $7,100,000.00). Wabash Plan, §§ 1.18, 1.28.

42. Based on the foregoing, the Court finds that the liquidation value of Wabash is approximately $213,210,000. 00, summarized as follows:

Headquarters building, transmission and distribution assets, 25% interest in Gibson 5, general plant and equipment	

and vehicles (per stipulation, Dr. Ex. I)	$175,000,000.00
Marble Hill real estate and personal property, Marble Hill Salvage Account, Marble Hill Contractors Escrow Account, Marble Hill to Columbus Line, and 765 KV Switchyard (per stipulation, Dr. Ex. I)	29,800,000.00
PSI Settlement	0.00
S & L Settlement	0.00
Supply Contracts and other contract rights	0.00
CFC Investments	8,000,000.00
Investment Account	19,000,000.00
Operating Funds	7,100,000.00
SUB-TOTAL:	236,900,000.00
Less 10% Liquidation Cost and Taxes:	23,690,000.00
TOTAL LIQUIDATION VALUE:	$213,210,000.00[7]

43. Although no evidence of liquidation costs was presented, the Court knows from past experience with cases before it that Chapter 7 liquidation costs, including professional fees and taxes, would be at least 10%.

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[7] The Court notes that even if the *full* amounts of the PSI Se tlement and S & L Settlement could be recovered by a Chapter 7 tr stee (a proposition which the Court rejects), the total li uidation value of Wabash would still be less than $400 million.

III. REGULATORY JURISDICTION OVER WABASH

44. Because Wabash is a public utility, it is subject to regulation. Historically, as noted, the IURC and MPSC have exercised (and continue to exercise) regulatory jurisdiction over Wabash and its rates. As discussed below, litigation is pending in the District Court concerning whether the REA may preempt the jurisdiction of the state commissions. The merits of the preemption issue are not before this Court, but the likelihood and effect of REA preemption are critical to the REA valuations and feasibility of the REA Plan. Thus, the Court will review the status of the regulatory jurisdiction over Wabash.

45. On November 23, 1988, REA sent letters to Wabash, the IURC and the MPSC purporting to preempt the ratemaking jurisdiction of the state commissions. Wabash brought an action against REA in the District Court, seeking a declaratory judgment that REA lacks any authority to regulate the rates of Wabash. On May 16, 1989, the District Court granted summary judgment in favor of Wabash and held that REA's assertion of jurisdiction over Wabash's rates was "arbitrary, capricious, not in accordance with law, and of no force and effect whatever." *Wabash Valley Power Association, Inc. v. Rural Electrification Administration*, 713 F. Supp. 1260 (S.D. Ind. 1989) ("*Wabash v. REA (I)*"). Dr. Exs. L, N.

46. Following an appeal by REA and CFC, the Seventh Circuit Court of Appeals unaminously affirmed the District Court's decision in *Wabash v. REA (I)*. 903 F.2d at 445 (7th Cir. 1990). In affirming, the Seventh Circuit stated that "[a]fter all, the REA made its loans and guarantees on the assumption that state regulation would apply." *Id.* at 455.

47. On September 19, 1990, just prior to the beginning of this proceeding, REA again tried to preempt the rate making jurisdiction of the IURC—this time by adopting and publishing rules in the Federal Register. *See* REA Ex. B-37. On September 24, 1990, Wabash filed a Complaint against REA in the District Court, requesting a declaratory judgment that the preemption rules are invalid and unenforceable as applied to Wabash. *Wabash Valley Power Association, Inc. v. REA*, Cause No. IP90-1858C (S.D. Ind. 1990) (*"Wabash v. REA (II)"*). That action is pending.[8] On October 4, 1990, Wabash objected to the admissibility into evidence of the REA preemption rules on the grounds that such rules violate the automatic stay, 11 U.S.C. § 362, and are, therefore, null and void. The Court admitted the rules into evidence as being "potentially relevant." C/V T. p. 1354.

48. REA concedes that Wabash is regulated by the state commissions unless or until such time as REA prevails in *Wabash v. REA (II)*. C/V T. p. 1345.

IV. EVIDENCE ON WABASH'S FAIR MARKET VALUE AS A GOING CONCERN

49. For purposes of 11 U.S.C. §§ 506(a) and 1129(b), the Court must determine Wabash's fair market value as a going concern. Wabash's going concern value fixes the amount of the secured claims held by REA and CFC, § 506(a), and also determines the minimum amount which must be paid to creditors under

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[8] REA and Wabash have filed cross motions for summary judgment in *Wabash v. REA (II)*, and the matter is fully briefed.

§ 1129(b). In this connection, the Court will summarize the valuation evidence presented by Wabash and REA.

A. WABASH'S CASE IN CHIEF

50. Wabash called six witnesses during its case in chief. Generally, Richard Setlif f and Paul D. Reising testified regarding Wabash's power cost forecast, Professor Ian Macneil provided opinions concerning the effect of certain actions on the Supply Contracts, Robert Gross testified concerning Wabash's fair market value as a going concern, Dr. Wilbur' G. Lewellen testified regarding the additional value of Wabash to the Members, and Dr. Robert E. Olley reviewed the economics of the Wabash valuations.

1. Wabash's Power Cost Forecast (Dr. Ex. A-1); Testimony Of Richard Setliff And Paul D. Reising

51. Wabash's power cost forecast, Dr. Ex. A-I, was prepared by Richard Setliff and Paul D. Reising. Setliff is Wabash's manager of planning, and has a Master's Degree in economics from Indiana State University. C/V T. p. 33-34. Reising is a partner in the engineering and consulting firm of R.W. Beck & Associates ("Beck"), has an undergraduate degree from Purdue University in engineering, and has an MBA from Butler University. C/V T. p. 210. Reising has been doing consulting work for Wabash since about 1979. C/V T. p. 219. Generally, in the preparation of Dr. Ex. A-I, Setliff was responsible for projecting load growth, annual expenses relating to existing assets, administrative expenses, and expansion planning. Reising was responsible for projecting expansion costs and future wholesale power rates for Wabash and other utilities. C/V T. p. 40-47.

52. Dr. Ex. A-I was prepared at the direction of Wabash's two valuation experts, Robert Gross and Dr. Lewellen (whose qualifications and valuations are discussed below). The purpose of Dr. Ex. A-I was to analyze and contrast the annual power supply costs for the Members—both with Wabash in existence (the "with-Wabash scenario"), and without Wabash in existence (the "without-Wabash scenario"). In the with-Wabash scenario, costs were projected based on Wabash's continuation as a going concern with its existing contracts and future power supply needs. The without-Wabash scenario assumes that the Members would purchase all of their power requirements directly from their host utilities, PSI, I & M, NIPSCO and IPL, at average embedded cost.[9] Under both scenarios, variable expenses were escalated using a 4% inflation rate, and costs related to Marble Hill debt were excluded. C/V T. p. 37-49.

53. Dr. Exs. A-2 and A-3 are flow charts identifying the cost inputs for the with-Wabash and without-Wabash scenarios, respectively, and which result in the revenue requirements under each scenario. Table 1 in Dr. Ex. A-I summarizes the annual cash requirements under both scenarios, and this information was used by Wabash's valuation experts. C/V T. p. 52-58.

54. Dr. Ex. A-4 is a graph comparing the revenue requirements under Wabash's *most* costly scenario

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[9] 'These are the same four IOUs that supplied the Members prior to Wabash, and that are physically connected to the Members. C/V T. p. 228; Val. T. 1., p. 89. The term "average embedded costs" should be used, for purposes of this case, synonymously with "average system costs." "Average system costs" is considered to be the total costs (fixed and variable) divided by the units produced (i.e., the average unit cost of production).

(i.e., the without-Wabash scenario) and the revenue requirements under REA's purportedly *least* costly scenario (i.e., REA scenario 1, which is discussed below). To illustrate the difference between the studies, in the year 2020 the Wabash study projects revenue requirements of $750 million, while the REA study projects revenue requirements of $1.7 billion—more than a two-fold difference. Conf. T. p. 59-60.

2. The Supply Contracts; Testimony Of Professor Ian Macneil

55. As will be seen, the paramount factor affecting the going concern value of Wabash (as well as the conf irmation issues) is the continuing enforceability of the Supply Contracts. Based on the District Court's directive, see 111 B.R. 761, 765, 773, Wabash presented Professor Ian Macneil as an expert on contract law to interpret the Supply Contracts and their enforceability under the Plans proposed by the parties. C/V T. p. 486-560. REA did not offer any evidence on this issue. Macneil received his LL.B., magna cum laude, from Harvard Law School in 1955 and is currently the John Henry Wigmore Professor of Law at the Northwestern University School of Law. C/V T. p. 487. The Court accepted Macneil as an expert witness to give independent legal opinions on the Supply Contracts. C/V T. p. 492, 494-95. Dr. Ex. A-9 is Macneil's report containing his opinions on various issues concerning the Supply Contracts.

a. Terms Of The Supply Contracts And Effect Of REA Preemption And The REA Plan On The Supply Contracts

56. Based on his review of the Supply Contracts and other pertinent circumstances, Macneil testified that the parties' (i.e. Wabash and the Members)

"bargain in fact" included the following: (1) the Supply Contracts require that the IURC regulate Wabash's rates, C/V T. p. 501, 508-10; (2) the Supply Contracts empower the Wabash Board to set rates, prohibit Wabash from earning a profit, and require that rates be no higher than necessary to produce revenue to pay operating expenses, taxes, principal and interest payments,[10] and to provide a reasonable capital reserve, C/V T. p. 502, 511-12; (3) the Supply Contracts are conditioned on the Members retaining their right to manage Wabash, including its rate-setting functions, C/V T. p. 502, 513-21; and (4) the Supply Contracts are conditioned on the absence of significant changes in the regulatory scheme. C/V T. p. 503, 523-25.

57. Based on the foregoing provisions of the Supply Contracts, Macneil testified unequivocally that "the introduction of any regulatory scheme that changes the terms of the contracts," such as (1) the transfer of regulatory power from the IURC, (2) the loss of Member control over Wabash and its rates, or (3) the charging of rates in excess of Wabash's costs, will cause *Wabash* to breach the Supply Contracts. C/V T. p. 523-24. In response to the question of what effect REA preemption would have on the enforceability of the Supply Contracts, Macneil testified that:

> If REA is going to take over regulation for the purpose of paying itself off, what - I have [referred

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[10] On cross examination, Macneil emphasized that the list of allowable costs (and particularly principal and interest) is limited or qualified by the clause requiring that rates be approved by the IURC. C/V T. p. 578. Thus, reading the contract provisions to ether, Wabash may recover through rates only those costs which are recoverable under IURC rules.

> to as) predatory regulation rather than traditional regulation . . .; if that is their purpose and to carry out that purpose with . . . regulation, then it is going to result in breaches of these contracts if Wabash Valley has to abide by those regulations.

C/V T. p. 525.

58. Concerning the effect that confirmation of the REA Plan would have on the enforceability of the Supply Contracts, Macneil concluded in his report that "confirmation of the REA's plan to transform Wabash Valley into a rate-hiking profit center for the benefit of REA and other creditors would breach every [Supply Contract.)" Dr. Ex. A-9, p. 23; C/V T. p. 594. In the event that the REA Plan is confirmed, resulting in a breach of the Supply Contracts, Macneil testified that *Wabash* would be the breaching party, and that the Members would be relieved of any obligation to perform under the Supply Contracts. C/V T. p. 661-62.

b. Doctrine Of Frustration Of Purpose

59. Macneil not only determined that REA's proposed changes would breach the parties' "bargain-in-fact" as expressed in the Supply Contracts, but he also concluded that the doctrine of frustration of purpose would provide an additional basis for relieving the Members of their obligations under the contracts (though it was unnecessary to utilize this doctrine to discern the clear provisions discussed above). C/V T. p. 528. Macneil testified that the following events, or a combination thereof, would frustrate the purposes of the Supply Contracts, thereby giving the Members a valid defense to enforcement of the contracts: (1) the Members' loss of control over Wabash; (2) the loss of

regulation by the IURC; (3) a fundamental change in the regulatory scheme; and (4) the loss of tax-exempt status if it results in financial costs to the Members. C/V T. p. 536-42.

c. Assignment Of Rights; Delegation Of Performance

60. Macneil also testified concerning the assignability of the Supply Contracts. Assuming that *any* of Wabash's rights under the Supply Contracts are assignable, Macneil testified that the assignee would take those rights subject to all of the terms of the contracts and, therefore, to whatever extent such terms affect the value of the contracts, they would affect the value of the contracts in the hands of the assignee. C/V T. p. 505, 543-45. Other than the right to fully-earned payments, Macneil testified that Wabash's rights under the Supply Contracts are not assignable. C/V T. p. 506, 546-47. Macneil also testified that performance of Wabash's principal duties under the Supply Contracts is not delegable. C/V T. p. 507, 550.

3. Wabash's Going Concern Value To A For-Profit Willing Buyer; Testimony Of Robert J. Gross

61. Wabash presented Robert J. Gross as its expert witness on the issue of Wabash's fair market value as a going concern. Gross has been doing appraisal work since 1979, has been project manager on 100 to 150 appraisals, and has performed 40 to 50 going concern valuations of businesses during the two years preceding his testimony. C/V T. p. 278-79. Gross is certified as a senior member of the American Society of Appraisers ("ASA"), with a designation in business

valuation. C/V T. p. 279. Gross previously worked for American Appraisal Associates, and is currently a vice president in charge of Merrill Lynch's business brokerage and valuation division. C/V T. p. 280-82. Dr. Ex. A-11 is Gross' valuation report.

62. Gross testified that the purpose of valuing a business as a going concern is to estimate its fair market value, and he defined "fair market value" as the estimated value at which the business might exchange hands between a willing buyer and willing seller, each having reasonable knowledge of all relevant facts, neither being under compulsion and with equity to both. C/V T. p. 285. Gross testified that the definition of fair market value contemplates that an actual sales transaction will occur, and that the typical willing seller is someone motivated to sell at the highest possible price. C/V T. p. 288. According to Gross, Wabash is not a typical willing seller because of its motivation to maintain low rates; therefore, for purposes of his valuation, Gross assumed the Bankruptcy Court to be the willing seller because of its motivation to obtain the highest value. C/V T. p. 288-89.

63. Gross identified the following relevant facts and information that the willing seller and willing buyer of Wabash as a going concern should be aware of: (a) the most likely buyer of Wabash would be a profit-motivated, tax-paying IOU; (b) the Members, in their role as customers, would have a great deal of leverage on the transaction; c) the Wabash Articles of Incorporation and Bylaws place certain limitations on the transaction; (d) the customer base consists of 24 Members; (e) the Supply Contracts provide the Members with certain rights (see the discussion of Macneil's opinions, *supra*); (f) the Indiana Supreme

Court has explicitly denied a rate increase to obtain a return on the Marble Hill investment; and (g) the Wabash power cost study (Dr. Ex. A-I). C/V T. p. 290-91.

64. The information relied on by Gross to prepare his report and render his opinion on value included financial statements, operating statements, load forecasts, conversations with Wabash personnel, research of the capital markets, and research of the general economic environment in the electric market in Indiana. C/V T. p. 303. Specifically, Gross also reviewed certain of Wabash's Articles of Incorporation and By-laws (Dr. Exs. A-5, A-6 and A-7), a copy of one of the Supply Contracts (Dr. Ex. A-8) and Professor Macneil's written opinion concerning the Supply Contracts (Dr. Ex. A-9). C/V T. p. 293-94.

65. Gross testified that there are three approaches to valuing anything—the cost, market, and income approaches—and that the market and income approaches are typically used to determine going concern value. C/V T. p. 303-04. Gross selected the income approach as being most applicable to Wabash and testified that such approach seeks to determine the long range cash flows of the business and, depending on the risks of those cash flows, discount the cash flows back to the present at a rate that provides the buyer with an adequate return. C/V T. p. 305.

66. Because of the willing buyer's profit motivation, Gross testified that a sales transaction involving Wabash would require the willing buyer to renegotiate the Supply Contracts (which, as currently drafted, do not permit any profit). C/V T. p. 306. In Gross' view, the need to renegotiate the Supply Contracts would give the Members a great deal of

leverage in the transaction with the result being that a willing buyer "would not . . . factor into the valuation prices that exceed those that the [Members] could get on the open marketplace. To do so would risk the economic disintegration of Wabash Valley." C/V T. p. 307. Gross testified that the same four IOUs identified in Dr. Ex. A-I (NIPSCO, I & M, PSI and IPL) are alternative sources of power available to the Members. Given the availability of alternative power suppliers for the Members, Gross testified that a willing buyer would perceive that the Supply Contracts could be successfully renegotiated "only if the pricing . . . of power to the [Members] was at a price . . . exactly the same that they could get on the open market." C/V T. p. 308. Thus, Gross concluded that the rates of the neighboring IOUs have a limiting effect on the value of Wabash in the market. C/V T. p. 308.

67. The cash flows used in Gross' valuation are based on the presumption that "all 24 [Members] remain intact, that they . . . unaminously agreed to revision of their contracts . . . in such a way that would reduce or even eliminate their board involvement, [a]nd lastly, that they agreed to prices that were the same as they could get from the neighboring [IOUs]." C/V T. p. 309-10. Gross testified that an appraiser must deal with the risks associated with the foregoing factors, and that risk in valuation is accounted for by modifying the discount rate, taking a discount off the value, or both. C/V T. p. 310-11.

68. Gross used a debt-free, cash-flow approach, which produces a fair market value of what the overall business is worth, and determines what the return will be on the total assets of the company. C/V T. p. 313-15. Gross selected a debt free approach because,

in his opinion, "the most meaningful information that I can provide to the Court is [what] the total enterprise is worth, regardless of the nature of its liability structure and capitalization." C/V T. p. 316.

69. Based on his conclusion that most typical willing buyers are profit oriented, and his examination of the market for electricity in northern Indiana which revealed that most of the electricity in that area is supplied by IOUs, Gross assumed that the willing buyer would be an IOU. C/V T. p. 317. Thus, in preparing his cash flows, although Gross utilized the revenue and cost calculations projected in Dr. Ex. A-I, Gross recast the information into a form that would be useful to an IOU considering the purchase of Wabash. Essentially, Gross converted the results in Dr. Ex. A-I into a more traditional profit and loss statement by making a computation for corporate taxes and making certain other adjustments necessary to compute a discounted cash-flow valuation. C/V T. p. 311-12, 318. The cash flows computed by Gross appear in Exhibit "A" to his report (Dr. Ex. A-II).

70. In determining his discount rate, Gross used the weighted average cost of capital, a method which identifies the appropriate costs for long term debt and equity. C/V T. p. 320. After calculation, Gross arrived at a discount rate of 10.2%. C/V T. p. 324.

71. Using a 10.2% discount rate, Gross present valued the cash flows from 1991 through 2020 appearing in Exhibit "A" to his report and arrived at a present value of $152,929,000.00. C/V T. p. 324. To measure the cash flows from 2021 into infinity, Gross calculated a residual (or terminal) value of $44,643,000.00. C/V T. p. 326. Gross testified that the sum of these two numbers, $197,572,000.00, represents "the value of the company before certain things have

to happen. I've referred to it in the report as [the] valuation chasm; and this $197,572,000.00 is on the other side of that chasm." C/V T. p. 327. On page 14 of Gross' report, Dr. Ex. A-11, is a matrix indicating that the risks associated with renegotiating the Supply Contracts, and thereby crossing the "valuation chasm," may be accounted for by applying a discount factor or increasing the discount rate. C/V T. p. 326-28.

72. Based on his evaluation of the risks, Gross testified that the fair market value of Wabash as a going concern is within the range of $172,86[illegible],000.00 to $197,572,000.00. Within that range, it is Gross' opinion that the fair market value of Wabash as a going concern is $190,000,000.00. C/V T. p. 329-30.

73. As a check to verify the reasonableness of his valuation, Gross inserted the $190,000,000.00 into the Wabash balance sheet. Gross testified that such a balance sheet test "is a reasonable test that . . . can be helpful in understanding the overall acceptability or error embedded in the valuation." C/V T. p. 330-31; Dr. Ex. A-10. Based on his use of the balance sheet, Gross verified the reasonableness of his valuation conclusion.

74. On cross examination, Gross explained why the Marble Hill debt was not relevant to his valuation, or to any other valuation of Wabash. Gross testified that REA counsel was "trying to indicate that the Marble Hill debt somehow adds value to a business enterprise and that by jacking up the liabilities of the company by hundreds of millions of dollars, somehow you create additional worth for the business. . . . I don't know why a hypothetical buyer in this case or seller could expect a buyer in this case to assume somebody else's obligation just so they can try, try to jack up

rates to collect money to repay a loan." C/V T. p. 353-54. On redirect, Gross testified that adding Marble Hill debt to the balance sheet would not increase the value since there are no assets associated with that liability, "[s]o you can't simply add value to the assets side of the equation by adding liability." C/V T. p. 394.

4. Wabash's Value To The Members; Testimony Of Dr. Wilbur G. Lewellen

75. Wabash next presented Dr. Wilbur G. Lewellen as a valuation expert to determine "the total value of Wabash" *to the Members.*[11] C/V T. p. 403-04. Lewellen has been a professor at Purdue University for 25 years, is the Herman C. Krannert Distinguished Professor of Management and Executive Education Programs, and teaches graduate level courses in finance. C/V T. p. 399-400. Lewellen has been extensively published in the area of finance, has been an expert witness in approximately 25 public utility cases, and has done valuations for approximately 20 enterprises. C/V T. p. 400-02.

76. Lewellen concluded that the total value of the benefits which Wabash provides *to the Members* is $221.7 million. C/V T. p. 403. Lewellen arrived at such value by comparing the costs of being associated with Wabash to the higher costs that would be

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[11] Because Lewellen's valuation method focused on the additional value of Wabash to the Members, it does not represent an application of the traditional willing buyer-willing seller standard for determining going concern value. However, as discussed below, Lewellen's value is relevant because it defines the maximum value of Wabash for the purpose of obtaining a viability rate increase before the IURC, and for the purpose of satisfying 11 U.S.C. § 1129(b)(2)(B).

incurred by the Members if they purchased power from their host IOUs. C/V T. p. 404-05. Lewellen generally described the cost savings or benefits being realized by the Members, and testified that he relied on Dr. Ex. A-I to obtain the specific cost savings. C/V T. p. 404-05, 413-16. Lewellen explained his valuation approach as follows: "Well, to approach the value, what 1 attempt[ed] to do is to look to basically why Wabash Valley was created in the first place. And it seemed pretty clear that the motivation was to achieve cost savings for the [Members] . . . and [it] seems relatively straight forward to me, then, this value of those cost savings is a sensible approach to estimating value [of] the organization." C/V T. p. 405-06.

77. Lewellen described his valuation as estimating the value of Wabash *to the Members*—as distinguished from a going concern value which presumes an actual sale to a third party. In Lewellen's opinion, $221.7 million is "the maximum value that the enterprise has as an operating entity." C/V T. p. 406. Lewellen testified that assets are commonly valued based on their cost savings potential and that his approach was particularly appropriate for valuing a not-for-profit entity such as Wabash. C/V T. p. 409-10.

78. Dr. Ex. A-13-is Lewellen's valuation report. C/V T. p. 408. Lewellen testified that the cost savings in his report for the years 1991-2020 were obtained from Table 1 of Dr. Ex. A-I, C/V T. p. 416, and that he made his own projection for the years 2021 into perpetuity. C/V T. p. 416-18. Lewellen calcu-

lated a 13% discount rate[12] based on his examination of the returns on ten midwestern public utility stocks. C/VT. p. 419-20. Using a 13% discount rate, Lewellen determined that the present value of the cost savings is $69.4 milion. C/V T. p. 429. Lewellen then added the debt associated with Wabash's operating assets, $152.3 million, to reach his total value of $221.7 million. C/V T. p. 431.

79. On cross examination, Lewellen explained that his valuation does not include Marble Hill debt service because he was "trying to value what this thing is worth, not what its liabilities are; but what its assets [are] worth." C/V T. p. 440.

5. Relationship Between The Two Wabash Valuations; Testimony of Dr. Robert E. Olley

80. Wabash presented Professor Robert E. Olley, an economist, to evaluate the economics of the Wabash valuations and the Wabash Plan. C/V T. p. 676. Olley is a professor of Economics at the University of Saskatchewan, where he teaches micro and macro theory, has held a senior management position with Bell Canada, and has provided consulting services on economic methodology in rate cases for public utilities. C/V T. p. 672-74.

81. Olley testified that the value of Wabash depends on whether it is to be sold or retained by the Members, C/V T. p. 678, and that, because of Wabash's not-for-or-profit status, "it's hard to think of buyers of

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[12] Gross and Lewellen posited different rates - 10.2% for Gross and 13% for Lewellen. The difference in these discount rates relates to the different methodologies used by the two witnesses. Gross applied a discount rate based upon the weighted average cost of capital for debt and equity. Lewellen, on the other hand, applied an equity discount rate.

physical assets that might generate profit as wanting to buy assets that don't generate profit." C/V T. p. 679. Although Olley acknowledged that one could create a hypothetical willing buyer for Wabash, he testified that it would "take pretty [strained) assumptions to do that." C/V T. p. 680-81. Olley testified that a willing buyer of a for-profit going concern would be most interested in the cash flows, while a willing buyer of a not-for-profit entity would be interested in cost savings. C/V T. p. 683-84.

82. Olley testified that, from an economist's perspective, the Members would pay more for Wabash than any other buyer because Wabash is tailored exactly to their requirements. C/V T. p. 685. Olley used the term "buyer's surplus" to designate the value of an enterprise above its cost (or liquidation value), and testified that the buyer's surplus will vary depending on the specific circumstances of the buyer and his use of the assets. C/V T. p. 688-89. In the case of Wabash, Olley testified that the buyer's surplus appears in the form of the capacity to realize cost savings for the Members. C/V T. p. 691. Olley explained that the Members would realize more buyer's surplus from owning Wabash (and would therefore place the highest value on Wabash) than any other buyer because the Members tailored Wabash to their own needs and wants. Olley added that an outside buyer would have to renegotiate the Supply Contracts, some benefits to the Members would not exist for an outside buyer, and the Members can exploit ("use") Wabash far more effectively than'any outside buyer. C/V T. p. 700-01.

83. Olley's testimony regarding the Members' "buyers' surplus" is graphically illustrated on Dr. Ex. A-16, p. 3. The lowest area, "B-O-K-A", represents the

liquidation value. The next area above the liquidation value, "F-O-K-A", represents the fair market value of Wabash as a going concern, and is the same as Gross' value of $190 million. The highest area, "E-O-K-A", represents "what the Members would pay . . . if you squeezed every last dollar out of them," and is the same as Lewellen's value of $221.7 million. C/V T. p. 700-07.

84. Olley testified that Gross' valuation of $190 million is the highest amount that a well-informed, willing buyer would pay to a willing seller of Wabash, and that such value is based on "some pretty brave assumptions" that the Supply Contracts may be renegotiated and that the IURC and MPSC will allow an acquisition adjustment large enough to pay such value through rates. C/V T. p. 717-18.

85. Olley also reviewed Lewellen's valuation, and testified that the cost-savings approach was an appropriate method of valuing Wabash. C/V T. p. 718. Olley testified that Lewellen's value represents "the maximum value you could possibly squeeze out . . . of these Wabash members before it would pay them to go find other arrangements were they free to do so." C/V T. p. 718. In Olley's judgment, Lewellen went about his valuation "in terms of economic concepts the right way and he's got about the highest number you could put on that area ["E-O-K-A"] on page 3 of [Dr.] Exhibit [A-16]." C/V T. p. 719.

B. REA'S CASE IN CHIEF AND REBUTTAL

86. REA called eight witnesses during its case in chief and rebuttal of the Wabash case. Generally, Robert Ruddy testified regarding the amount of the REA debt, Andrew J. Moody, Howard Stone and Alison J. Thimis testified regarding REA's power

cost forecast, Raymond F. Radigan testified regarding Wabash's power supply market, Paul L. Gioia testified regarding whether the IURC would consider granting Wabash a viability rate increase, Thomas B. Heath testified regarding the REA Plan, and Charles E. Jerominski testified regarding Wabash's going concern value.

1. Amount Of The REA Debt; Testimony Of Robert Ruddy

87. Robert Ruddy, the director of REA's fiscal accounting division, testified that the primary purpose of the REA is to make construction loans to rural electric cooperatives. C/V T. p. 791. The REA guaranteed three loans made by the FFB to Wabash, in the total principal amount of $622 million. Ruddy estimated that the total amount of the REA debt as of January 1, 1991 (including post-petition interest) is $1.051 billion, less the $28 million paid by Wabash from the Timbers Account. C/V T. p. 795-96. REA divides the $1.051 billion debt into $609 million principal and $442 million accrued interest. C/V T. p. 796.

2. REA's Power Cost Forecast (REA Ex. B-28); Testimony Of Andrew J. Mood Howard Stone And Alison J. Thimis

88. REA's power cost forecast, REA Ex. B-28, was prepared by Alison J. Thimis, with data input from Andrew J. Moody and Howard Stone. Thimis is employed by Burns & McDonnell Consulting Engineers & Architects ("Burns & McDonnell"), which does power supply studies in the utility industry. C/V T. p. 1033. Stone has a Master's Degree in Economics and works in the economic analysis branch of the

REA. C/V T. p. 862. Moody is a vice president of AUS Consultants, a consulting and market research firm. C/V T. p. 810.

89. Moody's assignment was to provide long-term trend forecasts of economic activity and fuel prices for both the U.S. economy and the State of Indiana. C/V T. p. 814. Thus, Moody provided long-term forecasts of such variables as the gross national product, Indiana gross domestic product, population growth, employment rate, fuel prices, personal income, and the downward trend in the farming sector's share of the Indiana economy. C/V T. p. 814-58. Among other trends, Moody projects that net farm income in Indiana will increase at an average annual rate of 2.2% (which, according to Moody, represents a real *decline* in net farm income of roughly 2.3% per year), that Indiana farm employment will decline by 1.5% per year, and that from the period 1990 through 2027 the total net Indiana farm income in 1982 dollars will decline from $861 million to $367 million. C/V T. p. 843-58; Dr. Ex. A-18.

90. Based on information from Moody and other variables, Stone developed an econometric model to forecast Wabash's load growth under the various rate increase scenarios fabricated by REA. C/V T. p. 873.[13] Stone testified that the purpose of his econometric model was twofold: (1) to determine whether the rate increases set forth in the REA Plan are

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[13] REA scenario 1 requires a 12.1% rate increase in the first year; REA scenario 2 requires three 9% rate increases over a two year period plus six 4% rate increases in subsequent years; REA scenario 3 requires three 9% rate increases over a two year period. Additionally, all three scenarios require regular cost of service rate increases. C/V T. p. 920-23.

economically achievable, and (2) to project a load growth which, when combined with the costs of power to the Members projected by Thimis, would create a revenue stream for the purpose of determining Wabash's going concern value. C/V T. p. 873, 876-77.

91. The revenue stream was created from the combined load growth and cost projections by adding what Stone referred to as a "fixed debt service adder" to the costs. C/V T. p. 923, 1009.[14]

92. Based on his econometric model and review of certain historical data, Stone concluded that Wabash will continue to experience load growth notwithstanding the rate increases suggested by REA, and that factors such as increased income will offset any price elasticity effects caused by the rate increases. C/V T. p. 972-73.

93. Rather than delve into the formulas and methodology utilized in Stone's econometric model (see REA Ex. B-9), the Court need only consider whether Stone's final load forecast result is more reliable than Wabash's load forecast result (and whether, ultimately, the discrepancy is material to the issues

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[14] Stone described the "fixed debt service adder" as a computation whereby the rate increase for the first year is onverted into a fixed mills (or cents) per kilowatt hour charge hat remains in the rates through 2027. Thus, for example, under REA scenario 3 (3 x 9%) the debt service adder computed by Stone is 1.4> per kilowatt hour sold, which remains fixed through 2027. C/V T. p. 923. Under REA scenario 1 (12.1%), Stone computed a mixed debt service adder of 5 or 6 mills per kilowatt hour (i.e., .05> or .06>) which would stay in rates through 2027. C/V T. p. 1007. The impact of Stone's "fixed debt service adder" is reviewed in ¶¶ 128-130, 152, 155-156.

decided herein). The Court considers this issue under sections IV. C. 2. and VI., *infra*.

94. Burns & McDonnell, and Thimis in particular, were retained by REA to prepare a long-term power cost study and provide revenue estimates for the period 1990-2027 for six Indiana-based utilities: Wabash, NIPSCO, I & M, PSI, IPL, and Hoosier Energy Rural Electric Cooperative ("Hoosier"). C/V T. p. 1049. As mentioned above, Thimis relied on Stone's load forecast in preparing her power cost study for Wabash. Significantly, in making her projections, Thimis testified that Burns & McDonnell was directed by REA to develop three different scenarios reflecting three different asswned rate increases for Wabash: scenario 1 -- 12.1% rate increase in 1991; scenario 2 -- three 9% rate increases in 1991, 1992 and 1993, followed by six 4% rate increases; and scenario 3 -- three 9% rate increases in 1991, 1992 and 1993. Burns & McDonnell sought to project the actual costs based on these three assumed rate increase scenarios. REA Ex. B-28; C/V T. p. 1067. The revenue reguirements (i.e., costs) projected by Burns & McDonnell were then provided to Charles E. Jerominski, REA's valuation expert (whose credentials and valuation are discussed below).

95. REA Ex. B-30 compares the Wabash and REA power cost studies. The chart indicates that while Wabash is projecting that its costs will increase at an annual rate of 3.74%, REA is projecting that Wabash's costs will increase at an annual rate of 5.52% (assuming no debt service costs paid to REA for Marble Hill debt), and at an annual rate of 5.73% (assuming the rate increases in REA scenario 3). C/V T. p. 1077. Thus, using Wabash's assumed 4% inflation rate, Wabash projects that its costs will

decline in real terms by approximately .26%. Using REA's assumed 4.5% inflation rate, REA projects that Wabash's costs will increase in real terms by roughly 1%.

96. Thimis identified four variables that she believes explain nearly all of the difference between the Wabash and REA power cost forecasts. According to her testimony, the principal variables on which the parties made different assumptions are: 1) load growth; 2) inflation rate; 3) unit retirements; and 4) the cost of power from Hoosier. C/V T. p. 1084-1092. Thimis testified that when Burns & McDonnell reran its study using *Wabash's* assumptions on the foregoing variables, the result "almost exactly mirrored the Wabash Valley run numbers." C/V T. p. 1094; REA Ex. B-31. The Court will return to a discussion of these four variables under Sections IV. C. 2. - 4. and VI. C.

3. Wabash's Power Supply Market; Testimony Of Raymond F. Radigan

97. Raymond F. Radigan testified for REA concerning the power supply market in the region served by Wabash, and the potential power supply options available to the Nembers. C/V T. p. 1143-44. Radigan is employed by Research Management International ("RMI") in Columbus, Ohio, a firm that provides engineering consulting services, and he has a background in utility planning. C/V T. p. 1138-39. Radigan's testimony appears to have been directed at refuting Wabash's projected costs in the without Wabash scenario, which assumes that the Members could purchase power from their host IOUs at average embedded cost.

98. Radigan's assignment from REA was to generally assess the power supply market in the region served by Wabash; he was not asked to prepare a specific power supply study or plan for the Members. C/V T. p. 1143-44. REA Ex. B-34 is RMI's market study for REA. For the purposes of his testimony and the RMI study, Radigan assumed that the Members were not bound by the Supply Contracts. C/V T. p. 1146-47.

99. Radigan testified that he examined the relevant market and found that there is surplus capacity available in the near term. C/V T. p. 1151-52. Radigan testified that some utilities have more surplus than others, that NIPSCO has 20% surplus, that I & M has a surplus, but that PSI and IPL will be adding some capacity in the mid-1990s. C/V T. p. 1155-56. Radigan testified that a purchaser of short-term supply in a surplus market would expect competition among sellers and, consequently, low prices, but in the long term, the addition of new capacity would likely mean higher prices for the buyer. C/V T. p. 1157-58.

100. In his study, Radigan hypothesized several power supply options that might be available to the Members without Wabash. Radigan testified that the "easiest [option] to think about" is one where the Members simply purchase power from their host IOUs as they did prior to Wabash (which is the assumption made by Wabash in the "without-Wabash scenario"). C/V T. p. 1168-69. Radigan generally alluded to the following potential obstacles that may make this option uncertain: a) circumstances have changed; b) the Supply Contracts; c) the cost of power for those Members in the NIPSCO area may be higher than remaining with Wabash; d) the Members

would lose the benefits of Gibson Unit No. 5 and transmission agreements; e) the uncertainty over whether the members would be able to acquire power at average embedded cost; f) assuming that the Members do not own the substations, they would have to acquire or construct substations, and financing would be difficult since REA has cut off loans to the Members; and g) acid rain legislation. C/V T. p. 1168-93. Radigan was unable to quantify the results of his study and merely concluded that developing a power supply option for the Members would not necessarily be an "easy task." C/V T. p. 1206-07.

101. On cross examination, Radigan admitted that there is currently a surplus market for electricity, C/V T. p. 1216-17, and that if Wabash ceased supplying the Members and the Members entered the power supply market, there would be an additional 700 megawatts of power available in an already surplus market. C/V T. p. 1231-33. This is consistent with Olley's testimony when he stated that: "If Wabash were dissolved, it would cease to purchase the 650 megawatts it now purchases, so there would be that amount of power now available . . . for buyers, and at the same time presumably the [Members] would go out on the market seeking to buy 650 megawatts of power." C/V T. p. 769-70.

102. During cross examination, Radigan refused to opine on whether a buyer would be able to acquire long term power today at average embedded cost. C/V T. p. 1217-20. Radigan also testified that he was unaware that in the summer of 1990 Wabash successfully entered into a 20-year power contract with I & M, at average embedded cost, to supply the new General Motors load. C/V T. p. 1209-10.

103. Radigan further testified on cross examination that a power supplier with excess capacity could not withhold that capacity in hopes of receiving a higher price when capacity diminishes. C/V T. p. 1220. Radigan did not analyze the benefits to the sellers in selling power to the Members at average embedded cost. C/V T. p. 1221.

4. Viability Rate Increase; Testimony Of Paul L. Gioia

104. REA presented Paul L. Gioia as a witness to render an opinion whether, in general terms, there is any regulatory basis for the IURC to approve a rate increase of the nature suggested in REA scenario 1, notwithstanding Indiana's "used and useful" rule. C/V T. p. 1257-58, 1300-01. Since 1987, Gioia has been employed as a senior vice president of the First Albany Corporation, a brokerage and investment banking firm in New York City. C/V T. p. 1247-48. His work experience includes an appointment as examiner in the Public Service Company of New Hampshire bankruptcy proceeding, C/V T. p. 1248-49, and a six year tenure as chairman of the New York Public Service Commission ("NYPSC"). C/V T. p. 1252-53.

105. Gioia never testified that the IURC would approve any particular Wabash rate increase; instead, Gioia speculated that the IURC would seriously consider extraordinary rate relief for Wabash if, after considering several factors such as the impact of the rate increase on consumers, the IURC determined that such rate relief would enable Wabash to exit bankruptcy as a financially viable utility. C/V T. p. 1257-.58, 1276, 1300, 1302. As support for his opinion, Gioia relied on his experience with the NYPSC and certain orders entered by the IURC concerning PSI

and NIPSCO. Gioia testified that, while with the NYPSC, the commission granted Long Island Lighting Company a viability rate increase after determining that extraordinary rate relief was in the public interest and, under the circumstances, a better alternative than bankruptcy. C/V T. p. 1253-55.

106. Gioia primarily relied on a 1986 IURC order granting PSI an 8.2% retail rate increase in the wake of Marble Hill. C/V T. p. .1259-60. *See* REA Ex. 38, 72 P.U.R. 4th 660 (Cause No. 37414) (referred to herein as the "PSI Case"). Gioia testified that in such order the IURC granted PSI an extraordinary rate increase after finding that PSI "was facing severe financial problems and was in eminent [sic] risk of . . . bankruptcy," that "the financial viability of the utility is essential for . . . the public to have confidence that the [utility] can provide the essential services that are entrusted to it," and that a bankruptcy proceeding could become a "drain on the resources and attention of [the] utility," thereby possibly jeopardizing the utility's ability "to provide essential services" to the public. C/V T. p. 1259-60. Gioia further testified that the IURC supported the 8.2% rate increase by creating a $475 million regulatory asset equal to estimated future tax benefits resulting from the Marble Hill write-off. C/V T. p. 1267-68. The PSI Case, and other cases, suggested to Gioia that the IURC would seriously consider "a rate increase based on restoring the financial viability of the company" if the IURC "concluded that the public's interest was served by the rate increase[,] that it was just and reasonable and that it was a way to reasonably restore the utility [to] financial viability." C/V T. p. 1276-77.

107. On cross examination, Gioia refused to opine on whether the IURC would grant any particular rate increase; instead, he reiterated his general belief that the IURC would consider some rate increase "that would return Wabash to financial viability and could conclude the bankruptcy case." C/V T. p. 1300-02. Gioia acknowledged that the primary objective of the IURC in the PSI Case was to keep PSI out of bankruptcy. C/V T. p. 1321. In response to the question of whether he had an opinion on whether the rate increase fabricated in REA scenario 1 would accomplish the objective of returning Wabash to financial viability, Gioia stated that he had no such opinion and that his analysis "assume[d] . . . that this rate increase would be part of a plan . . . that could successfully conclude this proceeding." C/V T. p. 1325-26. Gioia admitted that if a regulatory commission was presented with two plans, both capable of successfully ending a utility's bankruptcy case, but one required a revenue increase of 35% while the other required a revenue increase of 13%, the commission would favor the plan involving lower rates. C/V T. p. 1328-29.

108. Gioia's testimony was limited to the question of whether *Wabash* could seek a viability rate increase. He did not offer any opinions on whether the *willing buyer* could obtain a viability rate increase following its purchase of Wabash.

5. Testimony Of Thomas B. Heath

109. Thomas B. Heath is an assistant to the REA Administrator, and is responsible for dealing with REA's "troubled credits." C/V T. p. 1338. Based on his experience and review of the REA Plan, it is Heath's opinion that Wabash has the ability to pay the rate increases required in the Plan and remain a

viable entity.[15] C/V T. p. 1344. Based upon the projected rate composition graphically portrayed in REA Exs. B-38 -- 41, Heath does not believe that repayment of the entire Marble Hill debt represents an overwhelmingly significant burden for Wabash. C/V T. p. 1364-65.

110. With respect to whether any entity had ever expressed an interest in purchasing Wabash, Heath testified that there was an interest expressed by a cooperative and two IOUs, and that one of the IOUs had made "a very formal offer." C/V T. p. 1377-79.[16]

111. On cross examination, Heath acknowledged the uniqueness of the Supply Contracts (because of the specific reference to rate approval by the Public Service Commission of Indiana), and indicated that he was generally familiar (though not personally involved) with REA's efforts to develop a new wholesale power supply contract. C/V T. p. 1414-18.

112. On cross examination, Heath testified that REA scenario 2 (3 x 9% plus 6 x 4%) *and* scenario 3 (3 x 9%) "are within" the REA Plan, and that REA scenario 1 (12.1%) is only to discredit the Wabash Plan. C/V T. p. 1429. However, as Heath admitted, confirmation of the REA Plan "would require three 9% rate increases and 4% rate increases as necessary." C/V T. p. 1430-33. Heath testified that the

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[15] The REA Plan requires three 9% rate increases during the first two years, plus 4% rate increases in any year following a year in which debt service payments were missed *and* load growth was not less than zero, plus regular cost-of-service rate increases.

[16] Heath's testimony concerning the formal purchase offer made by an IOU was to correct his January, 1990 testimony when he stated that no formal offer had ever been made. C/V T. p. 1378-79.

additional 4% rate increases under the REA Plan would be necessary if Wabash's annual load growth is less than 3%. C/V T. p. 1434. Since not even REA is predicting that Wabash will experience annual load growth of 3%, it follows that the additional 4% rate increases would be necessary under the REA Plan and that, therefore, only REA scenario 2 is "within" the REA Plan.

113. Heath testified on cross examination that the REA Plan "does not specify how many dollars" must be paid to creditors, and that "[i]t's . . . a workable plan that will adjust itself to the facts in the future." C/V T. p. 1429, 1434. However, Heath testified later that the REA Plan purports to either retire the entire REA debt of "[s]lightly over a billion dollars" (including post-petition and post-confirmation interest) by the year 2027, or liquidate Wabash if the debt has not been retired by that time. C/V T. p. 1434, 1449.

114. With respect to the prior expressions of an interest to purchase Wabash, on cross examination Heath identified the interested buyers as Big Rivers cooperative, PSI and IPL. C/V T. p.1449-57. Big Rivers, which has only four members, never formalized its interest because it wanted "to see where the [Wabash] bankruptcy was heading." C/V T. p. 1449-50. Heath testified that PSI made a serious "formal" offer prior to the PSI Settlement, but REA did not accept the offer and Heath was unable or unwilling to produce a copy of the offer. C/V T. p. 1453-56. Heath testified that IPL's interest in acquiring Wabash never materialized into an offer. C/V T. p. 1456-57. REA did not advise Wabash or the Court of any offers to purchase Wabash. C/V T. p. 1452-55. REA has never sought this Court's approval of any offer to acquire Wabash.

6. Wabash's Going Concern Value To A Not-For-Profit. Willing Buyer; Testimony Of Charles Z. Jerominski

115. REA presented Charles E. Jerominski as its valuation expert. Jerominski is employed by AUS Consultants Valuation Services Group ("AUS"), in Milwaukee, Wisconsin. C/V T. p. 1470. Jerominski has an undergraduate degree in mechanical engineering from the Milwaukee School of Engineering, and an MBA from the University of Chicago. C/V T. p. 1471. Jerominski testified that he has been in the appraisal business for 21 years and that he is a senior member of the ASA. C/V T. p. 1472.

116. Jerominski understood that his assignment from REA was "to do a going concern or business enterprise valuation for certain tangible/intangible assets of Wabash." C/V T. p. 1478. Jerominski's valuation report is REA Ex. B-43. Jerominski testified that this was a unique assignment for him, and that in 21 years of experience, it is the first time in the utility context that he has valued a not-for-profit entity. C/V T. p. 1480. Although Jerominski considered valuing Wabash from the perspective of a for-profit buyer, and did not reject that approach, he testified that such an approach would be impractical because a) the assumptions necessary to transform Wabash and the cash flows are problematical, b) not-for-profit entities tend to remain not-for-profit ("institutional lethargy"), and c) the appraiser might lack specific information regarding certain benefits that may be available to the for-profit buyer and which should be reflected in the cash flows. C/V T. p. 1481-82. Thus, Jerominski assumed that the willing buyer of Wabash would be a not-for-profit entity. C/V T. p. 1482-83.

117. Besides his assumption that the willing buyer of Wabash would be a not-for-profit entity, Jerominski assumed that the Supply Contracts would remain in force and that the capital structure would be 100% debt. C/V T. p. 1482-83. (Jerominski made other assumptions regarding Wabash's cash flows, which are discussed below in connection with the REA scenarios.)

118. Jerominski rejected the market approach to valuation because he perceived there to be an insufficient number of comparable sales transactions, and relied instead exclusively on the income approach. C/V T. p. 1484-85. Jerominski testified that there are two components to the income approach to valuation: the future economic benefits of the cash flows and the risks of achieving those cash flows (i.e., the discount rate). C/V T. p. 1485. Using the "build up" method, where essentially a risk premium is added to a risk-free rate, Jerominski determined that 9.8% was the appropriate discount rate for his 100% debt-funded enterprise. C/V T. p. 1486-87.

119. To estimate Wabash's cash flows, Jerominski testified that he met with representatives from REA and Burns & McDonnell and "tried to come up with what we thought were reasonable scenarios concerning what the future cash flows might be." C/V T. p. 1496. Jerominski and the others at the meeting "came up with" the following cash flow scenarios: scenario 1 -- assumed 12.1% rate increase in 1991 plus cost of service rate increases; scenario 2 -- assumed three 9% rate increases in 1991, 1992 and 1993, plus six 4% rate increases in 1996, 2003, 2008, 2010, 2013 and 2023, plus cost of service rate increases; scenario 3 -- assumed three 9% rate increases in 1991, 1992 and 1993, plus cost-of-service rate increases. Scenarios 2 and 3 are

dependent on REA preemption and are "offshoots of REA's plan." C/V T. p. 1348, 1497.

120. Jerominski testified that the scenario 1 net cash flows were arrived at by taking the gross revenues from the Burns & McDonnell report, REA Ex. B-28, subtracting operating expenses and costs for future plant additions appearing in such report, and adding back depreciation expense appearing in such report. C/V T. p. 1501, 1504-05. Applying a 9.8% discount rate, Jerominski testified that the present value of the net cash flows from scenario 1 (plus the reversion value) is, in round numbers, $450 million. C/V T. p. 1508.

121. Jerominski testified that the same approach used in scenario 1 was used in scenarios 2 and 3, with the exception that he applied a 10.3% discount rate because of the perceived higher risk in realizing those cash flows, which are dependent on REA preemption. C/V T. p. 1508-09. Jerominski testified that the present value of the net cashflows from scenario 2 (plus the reversion value) is $975 million, and that the value for scenario 3 is $750 million. C/V T. p. 1508-09.

122. Jerominski described his valuation opinion as being "bifurcated," and testified that scenario 3 ($750 million) is the most probable result, but if those cash flows are not attainable, then scenario 1 ($450 million) is the most likely result. C/V T. p. 1510. In his report, REA Ex. B-28 p. 3, Jerominski states that the distinction between scenarios 1 and 3 is whether "REA is unable to preempt." Significantly, Jerominski rejected scenario 2 ($975 million) because "he was not convinced . . . that the REA really knew whether or not . . . [,] even if they thought they could put [the six 4% rate increases] in[,] that they would put them

in." C/V T. p. 1510. Jerominski concluded that scenario 2 "was not a reasonable valuation conclusion." C/V T. p. 1510. Jerominski thus refused to support the same rate increases that Heath testified were necessary for conf irmation of the REA Plan.

123. Using REA Ex. B-45 as an illustration, Jerominski testified that the most important difference between his valuations and the Wabash valuations is the level of the cash flows and not the discount rates. C/V T. p. 1513, 1515-16.

124. Although Jerominski found both Wabash valuations to be "intellectually interesting," he does not believe Lewellen's cost savings approach results in a fair market value conclusion, and he disagrees with Gross' assumption that the willing buyer would be a for-profit entity. Jerominski criticized both Wabash valuations for allegedly assuming away the issue before the Court which, according to Jerominski, is whether the Members "actually could raise rates and pay at those levels [assumed by REA)." C/V T. 1517. Finally, Jerominski testified through REA Ex. A-46 that Gross' value would be approximately $95 million higher if "everything else [was] held constant" and taxes were not subtracted from the revenues. C/V T. p. 1521.

125. On cross examination, Jerominski admitted that the definition of willing buyer assumes a reasonable knowledge of all relevant facts, and that the relevant facts in this matter would include economic conditions, legal constraints and regulatory constraints. C/V T. p. 1525. Jerominski viewed Wabash's 1989 financial statements and balance sheet, but testified that they were of limited value in the context of his valuation. C/V T. p. 1525-26. Jerominski was able to identify some of Wabash's tangible assets, but

he did not view such assets or prepare a separate cost valuation of such assets. C/V T. p. 1527-28. Jerominski testified that Wabash's most important intangible asset is the Supply Contracts, but he did not separately value the contracts. C/V T. p. 1530-40.

126. Jerominski testified on cross examination that a willing buyer would want to know the legal constraints associated with the Supply Contracts. C/V T. p. 1532. Jerominski agreed that the Supply Contracts require IURC regulation, C/V T. p. 1534, that the Wabash By-laws and Articles of Incorporation established Wabash as a not-for-profit entity and provide that the Members shall elect Wabash's Board of Directors, C/V T. p. 1532-33, and that the Members control Wabash's rates, C/V T. p. 1540, yet he testified that such constraints had no effect on his projected cash flows. C/V T. p. 1533-34. Jerominski testified that the enforceability of the Supply Contracts "could have an effect" on Wabash's value, that he reviewed Professor Macneil's opinion on the Supply Contracts as well as a written opinion from REA (which was not offered into evidence), and that his valuation opinion assumes the enforceability of the Supply Contracts. C/V T. p. 1536-38. He did not investigate what the value of Wabash would be if the Supply Contracts were unenforceable. C/V T. p. 1542.

127. On cross examination, Jerominski testified that rate regulation of Wabash could impact on its value, C/V T. p. 1545, and that a willing buyer would be interested in the existing regulation of Wabash, C/V T. p. 1530, and how regulation might affect future cash flows. C/V T. p. 1544. Jerominski testified that "it would be prudent for the potential investor to have some sense of how the [IURC) would likely view future rate increases." C/V T. p. 1535. Jerominski

reviewed the 1986 IURC order in the PSI Case and found the IURC to be "very flexible" and "very concerned about the future financial viability of PSI." C/V T. p. 1546. Scenario 1 (12.1% rate increase) was modeled on the 8.2% rate increase granted to PSI, C/V T. p. 1550, but Jerominski conceded that the Members have not approved a 12.1% rate increase. C/V T. p. 1548.

128. Whereas the scenario 1 rate increase is based on the IURC's "flexibility" shown in the PSI Case, the rate increases in scenarios 2 and 3 are based on REA's ability to preempt. C/V T. p. 1551. In all three scenarios, the net cash flows valued by Jerominski are dependent upon the revenues generated by the assumed rate increases. C/V T. p. 1550, 1555. Such revenues appear in the Burns & McDonnell study, REA Ex. B-28, next to the "REVENUE ADJUSTMENT [3]" line, where the explanatory footnote "[3]" refers to "Revenue derived from rate increases to cover REA debt." C/V T. p. 1555. Jerominski admitted that there are *no* operational costs associated with any of the rate increases postulated in the three REA scenarios, C/V T. p. 1556-57, which intensifies the impact of such rate increases on net revenues. C/V T. p. 1558. Jerominski testified that the rate increases are calculated for the entire 37-year study period plus perpetuity. C/V T. p. 1554. This was accomplished by computing what Stone referred to earlier as a "fixed debt service adder" and adding such amount to the cost of each kilowatt sold by Wabash until the year 2027. C/V T. p. 1560. The result of adding the "fixed debt service adder" to the cost of each kilowatt sold is that revenues automatically increase as load growth increases and more kilowatts are sold. C/V T. p. 1561.

129. As an illustration of the impact of the "fixed debt service adder," the Revenue Adjustment Line for REA scenario 1 shows that a 12.1% rate increase will create $20 million in 1991 but over $48 million in 2027. C/V T. p. 1561-62. The "fixed debt service adder" works the same way in scenarios 2 and 3, only the revenues produced are higher. C/V T. p. 1565. In scenario 2, the Revenue Adjustment Line projects that revenues will double between 1991 and 1992, double again in 1996 to $61 million, surpass $100 million in 2000, increase to $219 million in 2023, and reach $238 million in 2027, the last year of REA's study. C/V T. p. 1567. Jerominski used the revenues produced by the "fixed debt service adder," and appearing in the Revenue Adjustment Line, to arrive at his cash flows. C/V T. p. 1567.

130. On cross examination, Jerominski admitted that the gross revenues projected under REA scenario 1 increase from $198 million in 1991 to $3.2 billion in 2027. C/V T. p. 1576. In the year 2024, Jerominski projects gross revenues under scenario 1 of $2.4 billion (REA Ex. B-43, Appx. 1, p. 1), yet he acknowledged that such figure exceeds the total net farm income for the entire State of Indiana in the year 2024, which is projected by REA's own witness, Andrew Moody, to be only $2.3 billion. C/V T. p. 1579.

131. Jerominski testified on cross examination that, ideally, all three approaches to valuation (i.e., cost, market and income) would be used in all appraisals, C/V T. p. 1571, but he did not inquire into or analyze any sales of utilities, C/V T. p. 1573-74, or determine Wabash's liquidation value, although he was generally aware that the book value of Wabash's assets is "in the neighborhood of $130, $150 million." C/V T. p. 1574. Jerominski had no opinion on whether it was

reasonable to assume that a not-for-profit electric utility would have a going concern value-to-book value ratio of 5:1. C/V T. p. 1586.

132. Lastly, in response to the question of what the fair market value of Wabash would be if he were asked to do a valuation of Wabash on behalf of Hoosier, Jerominski testified that "I really couldn't answer your questions intelligently until I knew what the interests were of that specific coop." C/V T. p. 1581. Hoosier is a not-for-profit cooperative, and Jerominski assumed for purposes of his valuation that the willing buyer would be a cooperative. C/V T. p. 1580.

C. WABASH'S REBUTTAL TO REA CASE

In rebuttal to REA's case, Wabash called four witnesses. Dr. Shannon P. Pratt testified concerning the reliability of the Jerominski appraisal. Through Rick Coons, Wabash introduced evidence to rebut certain testimony of Thimis, Radigan and Gioia. Finally, Wabash recalled Reising and Setliff to rebut certain testimony of Thimis and to generally rebut REA scenario 1.

1. Critique Of Jerominski's Appraisal Testimony Of Dr. Shannon P. Pratt

133. As its first rebuttal witness to the REA valuations, Wabash presented Dr. Shannon P. Pratt, president of Willamette Management Associates, Inc., a national valuation firm. C/V T. p. 1592. Pratt received his undergraduate degree in business from the university of Washington in 1955; he also has a Master's degree in corporate finance from the University of Oregon and a Doctorate degree in finance from Indiana University. C/V T. p. 1593. Pratt is a senior member and fellow of the ASA, and is the only

fellow out of 34 in the United States with a designation in business valuation. C/V T. p. 1593-94. Pratt is a certified review appraiser, which means he is qualified to review other appraisals. C/V T. p. 1593-94. Pratt has been involved in approximately 2,000 going concern valuations, and in his capacity as certified review appraiser has reviewed nearly 200 valuations. C/V T. p. 1594-95.

134. Pratt reviewed Jerominski's appraisal and found that it does not properly measure the fair market value of Wabash as a going concern. C/V T. p. 1596, 1607. Pratt identified two fundamentally flawed assumptions in Jerominski's appraisal: 1) the ability of Wabash to raise rates to pay debt; and 2) that under all circumstances, including the fabricated rate increases, the Supply Contracts would remain in effect and the Members would be perpetually forced to purchase all of their power from Wabash. C/V T. p. 1596-97. Pratt reviewed Macneil's report concerning the Supply Contracts, wherein Macneil stated that if REA was successful in its reorganization plan (i.e., allowed to preempt the IURC and seize control of the Wabash Board), the Supply Contracts would be 64 breached and the Members would no longer be obligated thereunder. C/V T. p. 1597-98. Based on his review of Jerominski's appraisal and Macneil's report, Pratt was critical of Jerominski for merely adopting REA's assumptions, failing to provide any foundation supporting those assumptions, and failing to explain why, for example, he believes preemption scenario 3 is most likely, or why he believes the IURC is likely to approve the rate increase in scenario 1. C/V T. p. 1598-99.

135. Concerning REA's preemption scenarios, Pratt testified that a willing buyer would review the

Seventh Circuit's opinion in *Wabash v. REA (I)* and would conclude that a substantial risk exists in relying on preemption in estimating the fair market value of Wabash. C/V T. p. 1599-1600. With respect to Jerominski's addition of a .5% risk factor to account for the possibility of preemption, Pratt testified that "the risk factor of five-tenths of one percent proposed extra return to the investor to take a chance that all of those assumptions would in fact become reality is nowhere near enough to account for the risk as to whether or not those assumptions would become reality." C/V T. p. 1599.

136. Pratt calculated that the projected revenues under REA scenario 1 (which go from $157 million in 1990 to over $3 billion in 2027) increase at an annual compounded rate of 8.4%, which is more than double the expected inflation rate, and that he has great difficulty conceiving of a buyer that would rely on such dramatic revenue increases. C/V T. p. 1600.

137. Pratt described the assumptions underlying Jerominski's appraisal as being "extraordinary assumptions." C/V T. p. 1601-02. Pratt testified that there are appraisal standards applicable to extraordinary assumptions, that these standards are part of the "Uniform Standards of Appraisal Practice," and that the ASA (of which Jerominski is a member) has endorsed such standards. C/V T. p.1602-04. Dr. Ex. A-20 is a copy of the applicable Uniform Standards. Standard 10-1(c) requires that appraisers make full disclosure of extraordinary assumptions and quantify their impact on value. Significantly, the comment to such rule identifies "compliance with regulatory authority rules" as being an example of an extraordinary assumption or condition. C/V T. p. 1604-05. Because the term "fair market value" assumes that

the hypothetical buyer and seller are aware of and would rely on conditions that are either known or reasonably foreseeable as of the date of the appraisal, the standard requires an appraiser "to quantify the effect of any assumption which is dependent on some future event on which an investor would not necessarily fully rely as of the date of the appraisal." C/V T. p. 1606-07. In Pratt's opinion, Jerominski's report fails to comply with the Uniform Standards because it does not disclose the impact of his extraordinary assumptions on value. C/V T. p. 1605-06.

138. Pratt testified that Jerominski's report is not an appraisal of fair market value within the meaning of the definition, but instead represents what is known in the appraisal business as a "hypothetical appraisal."[17] C/V T. p. 1607. Based on sections 6.5 and 8.3 of the "Principles Of Appraisal Practice And Code Of Ethics" of the ASA, Dr. Ex. A-21, Pratt testified that Jerominski's report failed to comply with the standards for hypothetical appraisals. C/V T. p. 1608-10.

139. Contrary to Jerominski's statements on cross examination regarding Hoosier as a potential buyer of Wabash, Pratt testified that an appraiser's opinion of Wabash's fair market value should not change significantly depending upon the use of the appraisal. C/V T. p. 1611. An appraisal that takes into account the circumstances of a particular buyer, known as an "Investment Value Appraisal," is not a fair market value appraisal -- which assumes typically motivated

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[17] Pratt defined the term "hypothetical appraisal" as "an appraisal that is based on assumed conditions which are contrary of fact or which are improbable of realization or consummation."

buyers without special circumstances. C/V T. p. 1611.

140. Pratt testified that there are methods used by appraisers to test the reasonableness of their valuations, and he proceeded to apply two such tests to Jerominski's valuations. C/V T. p. 1611. Noting that a fair market value appraisal would normally consider both asset values and income streams, Pratt testified that one appropriate test is to examine the prices at which similar properties have exchanged hands and discern the relationship between prices and asset values. C/V T. p. 1612. This test "gives a person with common sense some notion of a range of reasonableness of a value of the entire entity related to its tangible asset value." C/V T. p. 1613-14. To test the reasonableness of Jerominski's conclusions, Pratt analyzed eight sales of public utilities (classified as electric generation and transmission companies) occurring between 1987 and 1989. Pratt found that the sales prices for the eight transactions ranged from .95 to 1.24 times the book value of the assets. C/V T. p. 1613. On cross examination Pratt clarified the point that all eight of the aforementioned sales were sales of going concerns. C/V T. p. 1629.

141. For his second test, Pratt added the aggregate value of the publicly traded stocks of IPALCO Enterprises, Inc. (holding company of IPL), PSI Holdings, Inc. (holding company of PSI), and NIPSCO Industries, Inc. (holding company of NIPSCO), to the value of the respective utility's liabilities, and divided the sum by the utility's asset value to arrive at a ratio for measuring the way the public values investments in such enterprises. C/V T. p. 1614-19. Pratt testified that an appraiser would then add a premium to the value to account for the difference between minority

and sole ownership of the stock. C/V T. p. 1614. Dr. Ex. A-19 contains the results of this test. Pratt found that the aggregate value of the stock, plus the debt for the three utilities, ranged from 1.12 to 1.21 times the book value of their assets. C/V T. p. 1615. Applying a 30% premium to the stock only (and leaving the debt at face value) would result in the total entity (stock and debt) selling for between 1.24 and 1.35 times the book value of the assets. C/V T. p. 1618.

142. Pratt testified that both of the methods described above are valid for testing the reasonableness of a valuation opinion on Wabash. C/V T. p. 1620. Pratt applied the first test (ratio of sales price to book value of assets) by multiplying the *highest* ratio (1.24) times a Wabash book value of $150 million, which resulted in a $186 million value for Wabash. C/V T. p. 1619. Pratt then applied the second test (ratio of stock and debt to book value of assets) by multiplying the *highest* ratio (1.35) times a Wabash book value of $150 million, which resulted in a $202.5 million value for Wabash. C/V T. p. 1620.

143. Although Jerominski did not inquire into any sales of utilities, C/V T. p. 1573-74, as discussed above, Pratt was able to cite 11 market observations of comparable properties through his application of the foregoing tests. The 11 market observations cited by Pratt indicate a range of values for similar properties which is between .95 and 1.35 times the book value of the assets. Pratt testified that this range of values indicates significant reliability because, in the appraisal business, the less diverse the numbers are, the more reliable they are usually considered to be. C/V T. p. 1620. Pratt concluded by reiterating that Jerominski's opinions cannot be relied on for the pur-

pose of determining Wabash's fair market value. C/V T. p. 1621.

2. Testimony Of Rick Coons

144. As described above, Thimis identified Wabash's load growth as one of the four variables which explain why REA is projecting substantially higher costs for Wabash. Rick Coons, Wabash's director of operations, testified concerning the discrepancy between the load growth and overall cost projections of Wabash and REA. Through Coons, Wabash introduced Dr. Exs. A-23 through A-26.

145. Dr. Exs. A-24, A-25 and A-26 illustrate that, while REA is projecting an average annual load growth for Wabash of *2.94%* (under REA scenario 1), Wabash is projecting an average annual load growth of *1.61%*, and the State Utility Forecasting Group ("SUFG") is projecting an average annual load growth of *1.94%*. Coons identified SUFG as an entity created by the Indiana General Assembly in 1985 for the purpose of developing *independent* forecasts of electric power usage within the State of Indiana. SUFG is staffed with experts in the field from Indiana and Purdue Universities, is funded by the Indiana legislature, and prepares electricity demand forecasts for Indiana on a regular basis and submits these forecasts to the IURC. C/V T. p. 1642-44. Dr. Ex. A-23 is the 1990 SUFG report.[18]

146. Because Wabash's service territory is directly adjacent to the service territories of the host IOUs,

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[18] Although REA also relied on SUFG in preparing its study, see REA Exs. B-14 and B-25, REA used a 1988 report rather than the 1990 report. REA Exs. B-24 and B-25 indicate that SUFG was projecting higher load growth in 1988 for Wabash.

C/V T. p. 1650, Coons compared the Burns & McDonnell load growth projections for the host IOUs with the various load growth projections for Wabash. Dr. Ex. A-25 illustrates that Burns & McDonnell is projecting 1.89% load growth for PSI, 1.47% for NIPSCO, and 1.43% for I & M, for an average annual load growth of 1.6%. As found above, Wabash projects that its load growth will be 1.61%, while SUFG is projecting 1.94% and REA has projected 2.94%. Thus, Wabash's load growth projection is consistent with the average load growth being projected by Burns & McDonnell for the IOUs in the same service territory.

147. Dr. Ex. A-24 illustrates Wabash's real price growth rate as projected by SUFG, Wabash and PEA. Whereas *both* SUFG and Wabash have projected that Wabash's costs will *decrease* in real terms by .3%, REA projects that Wabash's costs will *increase* in real terms by 1.1%. Dr. Ex. A-27 illustrates the real price growth rates for the four host IOUs as projected by SUFG, Beck and Burns & McDonnell. SUFG projects the following real price growth rates: PSI -.11%, NIPSCO -1.1%, I & M -1.9%, and IPL -.18%. Beck's projections are consistent with SUFG's and are as follows: PSI +.60%, NIPSCO -1.7%, I & M -.1%, and IPL -.25%. In stark contrast, Burns & McDonnell projects the following increases in the real price growth rates: PSI +2.44%, NIPSCO +.62%, I & M +2.17% and IPL +.95%.

148. Coons also rebutted Radigan's testimony concerning the ability to obtain power at average embedded cost in today's power supply market. Through Coons, Wabash introduced Dr. Ex. 22, which is a 20-year power supply contract executed on July 11, 1990, for the sale of power from I & M to Wabash. The con-

tract provides that I & M will supply all of Wabash's requirements for the General Motors load (26 megawatts) at rates based on average embedded cost. The contract was negotiated in approximately three months. C/V T. p. 1637-41.

149. In rebuttal to Gioia's testimony regarding whether the IURC would approve a 12.1% rate increase for Wabash, Coons testified regarding the aftermath of the PSI Case. Although none of REA's witnesses was aware of the status of the PSI Case beyond the 1986 IURC order, Coons introduced a 1988 IURC order and a 1990 IURC order in the PSI Case. Dr. Exs. A-29, A-30. The 1988 IURC order, Dr. Ex. A-29, directed PSI to *reduce* its rates by 9% effective July 1, 1988, to *reduce* its rates an additional 4.2% effective October 1, 1989, and to make a *$50 million cash refund* to its customers. C/V T. p. 1655-57. In the words of the IURC, the 1988 order caused "PSI's October 1, 1989 rates [to be] rolled back to the January 1983 order rate level. In fact, they are even slightly lower than the January, 1983 order rate level. This confirms the phase-out of PSI's 13.2% combined emergency rate increase as directed by the Commission's June, 1988 order." C/V T. p. 1658-59; Dr. Ex. A-30, p. 6. The 1990 order directed PSI to further *reduce* its rates by 4.25%. C/V T. p. 1659; Dr. Ex. A-30, p. 61.

3. Testimony Of Paul D. Reising

150. As described above, Thimis also identified unit retirements as one of the four variables which explain why REA is projecting substantially higher costs for Wabash. Whereas the REA study assumes a 50-year life for a base load coal unit, and at the end of such time the unit is automatically retired and replaced

with a new base load coal unit, C/V T. p. 1086, the Wabash study provides for one unit retirement based on published reports of American Electric Power that the Breed Station in western Indiana will be retired in 1996. C/V T. p. 1702.

151. Reising testified that no additional unit retirements were appropriate during the Wabash study period because: (1) the Wabash study includes such a substantial level of capital improvements (including over a billion dollars for PSI's oldest units) that, had he instead utilized more unit replacements, the impact on costs would have netted out; (2) utilities are putting greater effort into maintaining older units and avoiding the construction costs of new units; and (3) unit retirements are based on economics rather than age, and today some units are expected to have useful economic lives of 70 years or more. C/V T. p. 1703-11.

152. Reising also testified concerning the likelihood of the IURC approving the "fixed debt service adder" fabricated in REA scenario 1. Reising, who is experienced in rate matters and has been active in presenting testimony before the IURC, C/V T. p. 1688, contrasted the rate increase methodology utilized in scenario 1 with the rate increase methodology required by the IURC. Reising confirmed that the revenue stream utilized by Jerominski was derived by the use of a "fixed debt service adder," which produced the "revenue adjustment" figures appearing in the Burns & McDonnell report. C/V T. p. 1690-91. To produce the revenues shown in scenario 1, Reising testified that the 12.1% rate increase causes a 12.1% increase in revenues the first year *and* then becomes a "fixed adder" or "energy rate adder" in the calculations for all subsequent years. C/V T. p. 1691. Reis-

ing testified that ordinarily a 12.1% rate increase approved by the IURC would result in net revenues which would decline over time (i.e., as costs increase faster than load growth), yet the revenues in REA scenario 1 increase from $20 million to $48 million by the end of the study period. C/V T. p. 1692. Reising is unaware of the IURC ever permitting an "energy rate adder" to recover debt service. C/V T. p. 1694.

4. Testimony Of Richard Setliff

153. Thimis also identified the inflation rate and the cost of power from Hoosier as two of the four variables that explain why REA is projecting substantially higher costs for Wabash. The Wabash study assumes a 4% inflation rate, and the REA study assumes 4.5%. C/V T. p. 1726. On rebuttal, Setliff testified that the assumed 4% inflation rate is reasonable and based on a number of reliable sources. He also pointed out that both REA and Wabash utilized a 4% inflation rate in their previous studies, and that the District Court approved a 4% inflation rate in the Valuation Case. C/V T. p. 1726-28.

154. Setliff also testified regarding the cost of power from Hoosier. Essentially, the REA study assumes that the cost of power from Hoosier will escalate, while the Wabash study indicates that the cost of power from Hoosier will remain stable over the study period. C/V T. p. 1092-93. On direct examination, Thimis ridiculed the Wabash conclusion and supported her position by inferring that Burns & McDonnell had actually done Hoosier's cost forecast study in a separate project. C/V T. p. 1093. Setliff testified that Burns & McDonnell misinterpreted the contract between Hoosier and Wabash and incorrectly assumed that Wabash would be purchasing at a higher

rate. C/V T. p. 1729. Through Setliff, Wabash introduced Dr. Exs. A-32, A-33, A-34, and A-35. Dr. Exs. A-32 and A-33 are correspondence from Hoosier to Wabash representing that Hoosier expects its power costs to Wabash to remain *flat* (Dr. Ex. A-33 also reveals that Hoosier is assuming a 4% inflation rate). Dr. Ex. A-34 is the Burns & McDonnell cost forecast study for Hoosier which Thimis referred to on direct examination, but which was not introduced into evidence by REA. C/V T. p. 1731. Dr. Ex. A-35 is a graph comparing the Hoosier rate projections made in the Wabash study, the Burns & McDonnell study for REA, and the Burns & McDonnell study for Hoosier (Dr. Ex. A-34). C/V T. p. 1731-41. Notably, the Burns & McDonnell projection prepared for REA is drastically higher than its projection prepared for Hoosier, and the latter projection is very consistent with the Wabash projection.

155. Finally, Setliff testified, in detail, how Wabash's rates are established by the IURC. Setliff explained that Wabash is allowed to collect, through rates, sufficient revenues ("total revenues" or "TR") to recover its total costs ("TC"). TC includes power supply costs, administrative and operational expenses, allowances for renewals and replacements and

working capital. C/V T.p. 1748-49. When TC exceeds TR, the utility would need to seek rate relief from the IURC to recover those costs. C/V T. p. 1749-50. In preparing a rate case, the utility begins with a test year (a compilation of operating data from the most recent 12 months), analyzes the fixed, known and measurable changes that impact on costs, and adjusts the test year into a pro-forma test year, which is then reviewed by the IURC. C/V T. p. 1750-51.

156. Setliff identified Dr. Ex. 37 as a graphic representation of the IURC's approach to rate making. C/V T. p. 1752. Setliff explained that once the IURC establishes a rate, the rate remains at the same level until the next rate case; however, both total revenues and total costs will increase as load growth and costs escalate. Generally, costs increase at a faster rate than load growth; therefore, another rate increase will eventually be needed when TC exceeds TR. C/V T. p. 1752-55. In contrast, under the approach utilized in REA scenario 1, the formula for total revenue is not "TR = TC;" instead, it is "TR = TC x 1.12." C/V T. p. 1755-57. As shown in Dr. Ex. A-37, figure 4, the approach utilized in REA scenario 1 eliminates the possibility that TC will ever meet or exceed TR, thereby artificially overstating Wabash's revenues. C/V T. p. 1759-60, 1764-65.

V. THE SUPPLY CONTRACTS ARE CONDITIONED ON MEMBER CONTROL OF WABASH AND IURC REGULATION.

157. In the 1987 valuation hearing, the Wabash witnesses stated that the Members might breach or attempt to avoid the Supply Contracts if the price of power is raised above the competitive ceiling. The District Court found that the record did not support

the Bankruptcy Court's conclusion that the Members would break or avoid the Supply Contracts under such circumstances. 111 B. R. at 756, 768-69, 772-73 (error to find that Supply Contracts would be broken or avoided by *Members* if rates increased). Based on the evidence submitted at the remanded valuation hearing, it is obvious that the contract issue should have been stated differently. The actual issue is whether the Members may rely upon and enforce the rights they obtained in the negotiation of the Supply Contracts.

158. The Supply Contracts set forth the bargain-in-fact between Wabash and the Members. These agreements obligated the Members to purchase long term power from Wabash. In return, the Members negotiated for and received certain rights, including: (a) the right to set the initial rates of Wabash to its Members; (b) the right to have the IURC approve the final rates of Wabash to its Members; (c) the right to operate as a not-for-profit entity; and (d) the right to control the company through the right to elect the Wabash Board of Directors.

159. Based on Professor Macneil's unrebutted testimony and this Court's own analysis of the Supply Contracts, the Court finds that any or all of the following events would likely result in a material breach of the Supply Contracts by Wabash, freeing the Members from the constraints of such contracts and allowing them to purchase power elsewhere: (a) the loss of IURC regulation over Wabash; (b) the imposition of rates exceeding those permitted by the IURC; (c) the loss of Board control by the Members; (d) a fundamental change in the regulatory scheme; (e) REA preemption; and (f) confirmation of the REA Plan.

VI. FINDINGS THAT WABASH'S FAIR MARKET VALUE AS A GOING CONCERN IS NO MORE THAN $190 MILLION

A. OVERVIEW OF RELEVANT FACTORS BEARING ON THE FAIR MARKET VALUE OF WABASH AS A GOING CONCERN

160. REA and Wabash have stipulated that $175 million is the liquidation value of Wabash's tangible, useful assets, including (a) the 25% interest in Gibson Unit No. 5, (b) the interest in the joint transmission and distribution system, (c) distribution facilities, (d) the headquarters building, (e) the load management system, and (f) furniture, miscellaneous equipment and vehicles. Dr. Ex. I. Wabash's principal intangible asset is the Supply Contracts with its Members, which Martin, Pratt and Lewellen testified have no independent liquidation value. Conf. T. I., p. 36-38.

161. Ordinarily, one would expect that Wabash's creditors would insist that the company's assets be liquidated for the creditors' benefit unless Wabash had some greater value as a going concern. In this instance, Wabash and REA agree that Wabash is worth more as a going concern. The Court's task is to determine what the fair market value of Wabash is as a going concern.

162. In establishing the fair market value of a business or assets, a court typically looks to the "price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to sell and both having reasonable knowledge of relevant facts." Treas. Reg. (1.170A-1(c)(2)(1984). *See United States v. Cartwright*, 411 U.S. 546, 551 (1973); *Anselmo v. Commissioner*, 598 F.Supp. 575, 576 (D. D.C. 1984). In the prior Valuation

Case, the District Court indicated that this is a price that results from an informed bargaining process. 111 B.R. at 768, *citing In re Valuation Proceeding Under Sections 303(c) and 306 of the Regional Rail Reorganization Act*, 531 F.Supp. 1191, 1217-18 (Reg. Rail. Reorg. Ct. 1981). Buyers or sellers with special circumstances are excluded, but the Court must "take into account all considerations that the parties might fairly bring forward and give substantial weight in their bargaining." 111 B.R. at 768.

163. The parties have identified two different types of potential buyers for Wabash, an investor-owned utility and another not-for-profit cooperative. But as Olley explained, *any* potential buyer must derive an economic benefit from its purchase of Wabash or there will be no transaction.

164. A typical willing buyer is interested in how (and when) he is going to earn a return on his investment in acquiring a going concern. Because Wabash is a not-for-profit entity, it is extraordinarily difficult to imagine any hypothetical third-party buyer that would be willing to purchase Wabash (as is) for more than the value of its hard assets. While a substantial amount of testimony was directed to estimating Wabash's future revenue streams, such revenue streams would not have economic value to a hypothetical buyer if it takes over Wabash in its current form. This is because Indiana law requires that Wabash's revenues be adjusted periodically so that they cover only operating costs and a modest capital reserve allowance. Thus, the very not-for-profit nature of Wabash precludes any buyer from earning a profit or an economic return on the acquisition of Wabash as a going concern.

165. Wabash is a cooperative association that was formed for the specific purpose of benefiting its Members. The Members own and control the organization, through its Board of Directors, and determine the rates to be charged by Wabash, subject to approval by the IURC. Any potential buyer necessarily would consider the constraints inherent in this structure.

166. Moreover, as noted above in Section V., the Court agrees with the conclusions expressed by Macneil, that any involuntary displacement of IURC regulation of Wabash's rates or loss of Member control over Wabash would likely breach the bargain-in-fact between Wabash and its Members and release the Members from their purchase obligations under the Supply Contracts.

167. If any buyer of Wabash unilaterally attempted to recover its acquisition cost by increasing rates above the host IOUs' average system costs, it is likely that the Members would respond to this breach of the Supply Contracts by purchasing their power at average embedded cost from the host IOUs.

168. The Court finds it probable that the Members would be able to purchase all of their power requirements from the host IOUs at average embedded cost, notwithstanding the obstacles generally alluded to by Radigan, and that the costs projected in the without-Wabash scenario are reasonable. The first obstacle identified by Radigan is that "circumstances have changed," yet this ignores the fact that the Members previously purchased power from the host IOUs and they are still physically connected to them. *See* Martin testimony. Val. T. I., p. 89. Radigan identified the Supply Contracts as an obstacle, yet he assumed for purpose of his study that the Supply Contracts do not exist. C/V T. p. 1146-47. The next two obstacles

identified by Radigan, *i.e.*, increased costs for NIPSCO area Members and loss of Gibson Unit No. 5 and transmission agreements, are actually assumed to occur in the without-Wabash study, Dr. Ex. A-1, p. 12; therefore, such "obstacles" or increased costs already have been accounted for by Wabash. With respect to the fifth obstacle, whether the Members could acquire long term power at average embedded cost, Radigan merely testified that it is "difficult to answer" and "hard to determine." C/V T. p. 1179. The Court finds that the Wabash evidence on this issue — including the recent I & M contract, testimony that there is currently a surplus market (even before considering the 650-700 megawatts now purchased by Wabash), and the fact that the Members have historical and physical ties to their host IOUs — is more probative than Radigan's general uncertainty.

169. It is not necessary to determine precisely what rates would be available to the Members in the absence of Wabash. The risk associated with convincing the Members to renegotiate their contracts alone is sufficient to deter any investor-owned utility from purchasing Wabash for a premium above the value of its hard assets.

170. An investor-owned utility would not purchase Wabash unless it had a reasonable expectation that it could convert Wabash into a for-profit entity and thereby earn a profit on what it paid for Wabash either through rates approved by the IURC or other adjustments in regulatory treatment.

171. An immediate difficulty with this hypothetical transaction is that the Members would have to agree to such a change in Wabash's not-for-profit status and the terms of the Supply Contracts. The Members

would have no incentive to agree to such a radical change unless the purchaser could offer lower rates than the Members would otherwise pay to the host IOUs if Wabash ceased to exist.

172. Moreover, it is improbable that an investor-owned utility would risk such a purchase if it already has contracts for the sale of power to Wabash or may expect to contract directly with the Members in the event Wabash were to disband.

173. Another constraint upon the value that a hypothetical IOU would put on Wabash is the need of such a buyer to convince the IURC to let *it* raise its rates to recover the cost of buying Wabash, plus a return on that cost. Indiana law is an absolute bar against any utility, including Wabash and any potential buyer (whether not-for-profit or investor-owned), recovering through rates the sunk costs of a plant that is not used and useful. Moreover, a potential buyer may not be able to offer the same justification that Wabash could for a viability rate increase.

174. A not-for-profit cooperative would not be interested in buying Wabash unless it could show an economic benefit to its ratepayers from such purchase in the form of cost savings. No evidence was presented that a not-for-profit cooperative could derive any economic benefit from the purchase of Wabash. While REA's witness Jerominski assumed that the potential buyers of Wabash would most likely be not-for-profit cooperatives, he failed to explain what economic incentive would induce any other not-for-profit cooperative to acquire Wabash.

175. The unlikely prospect of a willing buyer for Wabash is confirmed by the fact that since the District Court's remand for additional valuation findings, REA has not produced any evidence that sup-

ports even an inference that there is a willing buyer for Wabash. On the contrary, REA's witness Heath admitted that all discussions between REA and potential buyers have proved fruitless.

B. REJECTION OF REA'S "RATE INCREASE SCENARIOS"

176. REA has proposed three "rate increase scenarios," resulting in values of $450 million, $750 million and $975 million. REA scenario 2 ($975 million) was rejected by REA's own appraiser, Jerominski, and REA presented no evidence to support it; therefore, the Court need not consider such valuation. Nevertheless, because REA scenario 2 suffers from the same defects as REA scenarios 1 and 3, it is also discussed herein. In each scenario, REA proposes that Wabash's value should simply be increased by the size of rate increases that REA assumes Wabash can implement in the future to repay its debt to REA. The Court finds a number of fatal flaws in REA's approach to the valuation issue.

1. Wabash's Value Cannot Be Measured By Its Liability To REA.

177. As a fundamental matter of common sense, the Court finds that there is no reason that any third party would want to purchase Wabash's liabilities, whether they are $450 million, $750 million or $975 million, and then raise rates to its existing customers in order to repay those liabilities. REA's contention that the going concern value of Wabash depends on its liabilities is inconsistent with the directions from the District Court on remand since there is no conceivable buyer who would willingly pay money simply to assume a debt. REA's rate increase scenarios as-

sume that Wabash's rates will be increased to repay the debt to REA. This, of course, results in no economic benefit to a hypothetical purchaser. Why would anyone want to purchase Wabash to be a collection agency for REA and impose the financial burden of repaying REA's debt upon its ratepayers?

178. The Court accepts the opinions expressed by both Gross and Lewellen that Wabash's market value as a going concern cannot be increased by raising its rates to pay its debt to REA. Apart from the constraints of Indiana rate regulation, there are simply no Marble Hill assets to support the REA proposed rate increases for its valuation "scenarios."

179. It is clear to the Court that Wabash's value cannot properly be measured by the amount of its debt, as REA proposes. The proper focus of any inquiry into the going concern value of Wabash must be the cost savings or profit that a willing buyer could realize, which in turn depends on Wabash's used and useful assets and the continued enforceability of the Supply Contracts. Since REA's "scenarios" contemplate that Wabash will raise rates in amounts ranging from 12.1% to 51% for the sole purpose of repaying the Marble Hill debt to REA, these "scenarios" are not instructive for determining going concern value.

2. REA's "Rate Increase Scenarios" Are Contrary To The Evidence.

180. The Court further finds that REA's three rate increase "scenarios" rest on a number of premises that the Court rejects as contrary to the evidence regarding the regulation of Wabash's rates and the consequences of any attempt to alter the contractual relationships between Wabash and its Members.

181. Two of REA's scenarios -- scenarios 2 ($975 million) and 3 ($750 million) -- depend entirely upon REA's authority to preempt the application of Indiana law to Wabash's rates. REA's final scenario -- scenario 1 ($450 million) -- depends upon an assumption that the IURC will approve a permanent 12.1% "fixed debt service adder" even without REA preemption and regardless of the used and useful rule and without regard to the comparative costs and benefits of such a rate increase.[19] The Court rejects REA's rate increase/debt collection scenarios as invalid.

a. REA's Scenarios 2 And 3 Are Not Credible Because They Depend Upon Preemption To Displace Indiana Rate Regulation.

182. The unrebutted testimony of Macneil established that the Supply Contracts are conditioned upon IURC regulation of Wabash's rates. C/V T. p. 501, 508-10. Both the District Court (713 F. Supp. at 1270) and the Seventh Circuit (903 F.2d at 455) reached the same conclusion in *Wabash v. REA (I)*. REA's witnesses frankly conceded that the rate increases in REA's scenarios 2 and 3 depend upon REA preemption of IURC regulation of Wabash's rates. While Jerominski agreed that the Supply Contracts require that Wabash's rates be approved by the IURC (C/V T. p. 1534), he nevertheless assumed whatever rate in-

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[19] The REA really has not formulated any "plan" to reorganize and operate Wabash as a going concern. Instead, REA and its witnesses have fabricated certain rate increases and attempted to quantify the present value of future income streams, assuming in the first instance that REA can implement and collect such rate ncreases. If such rate increases and/or revenue projections are not realized, REA retains the right to liquidate Wabash at any time during the next 37 years.

creases REA asked him to assume. Again, the basis for this assumption is nothing more than REA's purported right to supplant this specific contractual requirement.

183. The Court is well aware that REA's prior attempt to preempt by letter was rejected in *Wabash v. REA (I)*. REA has now promulgated its Preemption Rules, the validity of which Wabash once again has challenged. Given the prior ruling by the District Court and the Seventh Circuit in *Wabash v. REA (I)*, this Court doubts REA has authority for its latest attempted preemption.[20] However, this Court need not resolve the issue to determine the reasonableness of REA's scenarios 2 and 3. Even if REA had the authority to adopt and apply its Preemption Rules to Wabash, REA simply would win the battle and lose the war. Macneil's unrebutted testimony establishes that if REA were to preempt state regulation of Wabash's rates, that would free the Members from their obligations under the Supply Contracts.

184. Without enforceable Supply Contracts, REA's scenarios 2 and 3 are meaningless. REA's own valuation witness, Jerominski, conceded that the enforceability of the Supply Contracts "would have an effect" on Wabash's valuation. C/V T. p. 1536-37. While Jerominski stated that REA had provided him with a written opinion that the contracts were enforceable (C/V T. p. 1537), REA never produced this "opinion" at trial to be subjected to cross examination. Mac-

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[20] REA's Health testified that preemption was an essential aspect of REA's scenarios 2 and 3 (C/V T. p. 1348), and that if this breached the Supply Contracts, he did not know whether he still believes that the REA Plan is feasible. C/V T. p. 1436-37.

neil's testimony is the only competent evidence on the enforceability issue that was presented to the Court.

b. <u>There Is No Evidence That The IURC Is Likel To Grant The Permanent 12.1% "Fixed Debt Service Adder" That Is The Premise Of REA's Scenario 1.</u>

185. REA has failed to present competent evidence that the IURC is likely to grant the buyer of Wabash the permanent 12.1% "fixed debt service adder" assumed in REA's scenario 1.

186. The testimony of REA's own witnesses clearly establishes that the 12.1% rate increase was concocted by REA, its attorneys and consultants. For example, Stone, an REA economist, admitted that the 12.1% "fixed debt service adder" was merely the mathematical equivalent of the 8.2% retail hike the IURC had granted PSI (C/V T. p. 921-22), and that the entire concept of a 12.1% rate increase was simply REA's response to the question of what would be an alternative rate increase in the event that REA could not preempt Indiana rate regulation. C/V T. p. 1004.

187. Gloria's testimony was the only evidence that REA offered in support of its contention that Wabash could raise its wholesale rates by 12.1%. The Court finds that Gloria's testimony does not support REA's conclusion for at least two reasons.

188. First, Gloria studiously refused to offer an opinion that the IURC would raise Wabash's rates by 12.1% or any other particular amount. In fact, on cross examination, Gloria specifically rejected the suggestion that he had testified that the 12.1% rate increase in REA's scenario 1 likely would be approved by the IURC (C/V T. p. 1300), and stated: "I'm not comfortable in stating that I have a degree of confi-

dence that the Commission would approve that specific rate increase." C/V T. p. 1302.[21]

189. Second, REA's assumption of a 12.1% wholesale rate increase must be rejected because there is no logical relationship between PSI's temporary rate relief and REA's assumption of a "fixed debt service adder" that will be effective for the next 37 years. The REA witnesses uniformly admitted that REA's assumed 12.1% wholesale rate increase was merely an extrapolation from the 8.2% retail rate increase that the IURC approved for PSI after the abandonment of Marble Hill. However, the 8.2% *interim emergency* retail rate increase approved in March, 1986, was not only rescinded two years later by the IURC, but PSI was also required to make an additional cash refund of $50 million to its retail customers. REA offered no explanation how PSI's *temporary* (approximately 24-month) *emergency* rate hike for cash flow relief could be precedent for a *permanent* rate increase that REA expects to collect from Wabash and its Members for the next 37 years. On the contrary, PSI was granted a temporary rate increase as an alternative to bankruptcy based upon a specific finding by the IURC that PSI's ratepayers would be better off under such regulatory treatment.

190. Based on the evidence introduced by Wabash, the Court also believes that the distortions in the assumed 12.1% rate increase underlying REA's scenario 1 would likely not be countenanced by the IURC. Both Setliff and Reising testified that REA's

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[21] Gloria also admitted that he did not know whether a 12.1% rate increase would be sufficient to return Wabash to financial viability and provide necessary access to capital markets. C/V T. 1325-26.

rate increase was structured as an unconventional "fixed debt service adder." C/V T. p. 1691-92. Reising has extensive experience in rate proceedings for various utilities before the IURC. C/V T. p. 215-17. Reising explained that ordinarily a 12.1% increase as approved by the IURC would result in net revenues that would decline over time (as costs increased). The study that Burns & McDonnell prepared for REA used a "fixed adder" that generates a constantly increasing (*not* decreasing) revenue adjustment for REA debt service.[22] C/V T. p. 1692. As part of Wabash's rebuttal, Reising testified that he was not aware of any instance where the IURC had authorized an energy rate adder for debt service like REA's, nor was he aware of any trend developing in the IURC's rulings that might support REA's position. C/V T. p. 1694.

191. The exhibits presented by Wabash graphically demonstrated the extent that REA scenario 1 distorts Wabash's revenues (and, therefore, its value). For example, Dr. Ex. A-4 compares the annual revenue requirements projected in the REA study under scenario 1 with those projected in the Wabash study. By the year 2020 (the last year in the Wabash study), the Wabash study projected that Wabash's revenues from the sale of electric power would be approximately $750 million, while the REA study projected annual revenues of approximately $1.7 billion (compared to approximately $150 million for 1990). REA's revenue projections simply have no

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[22] For scenario 1 alone, REA projected that the "fixed debt service adder" based on a 12.1% rate increase will produce $20 million of debt service payments in 1991 and over $48 million in 2027. C/V T. p. 1561-62.

basis in reality, and thus, grossly distort the valuation REA seeks to derive from such revenue stream. For example, Pratt pointed out that REA's scenario 1 projected Wabash's revenues to increase at an annual compound rate of 8.4%, which is more than twice the expected inflation rate. C/V T. p. 1600. Jerominski conceded that REA scenario 1 projects that by 2027 Wabash's total annual revenues will be $3.2 billion, even though REA's own witness, Moody, estimated that the total net farm income in 2024 for the entire State of Indiana would be only $2.3 billion. C/V T. p. 1579.[23]

c. REA Ignores The Requirement That Any Viability Rate Increase Cannot Exceed The Value That The Utility Service Confers On The Ultimate Consumers.

192. The Court further finds that REA's scenario 1 is based upon the flawed assumption that the IURC will allow a buyer of Wabash to impose a 12.1% "fixed debt service adder" regardless of the costs or benefits for the ultimate consumers. REA's own witness, Gloria, establishes that the IURC will analyze any proposed Wabash rate increase to ensure that the costs do not exceed the benefits to the ultimate consumers. C/V T. p. 1253-55. Jerominski admitted that the IURC approved PSI's temporary rate increase in 1986 only after analyzing the relative costs

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[23] It is also a mystery where REA expects to generate these staggeringly high electric revenues when Moody estimates that real farm income in Indiana will constantly drop from $861 million in 1990 to $367 million in 2077. C/V T. p. 843-58; Dr. Ex. A-18. Moody also testified that during this same time period real farm income in Indiana will decline approximately 2.3% per year. *Id.*

and benefits of such an increase and concluding that it was better to pay higher retail rates in the short term than to allow PSI to go into bankruptcy with a resulting loss in consumer and business confidence and drain on PSI's management. C/V T. p. 1259-60; REA Ex. 38.

193. The analysis by Lewellen and Olley identifies the maximum viability increase that could possibly be applied to Wabash. Lewellen's valuation captures all the economic benefit that the Members can and will derive from the Wabash organization and all its tangible and intangible assets. The IURC would not approve rates that are tied to a higher value because there no longer would be a correlation between costs and benefits. That is the fundamental flaw in REA's rate increase scenarios. The Court accepts the economic analysis of Olley that the upper limit of a viability rate increase, as a matter of economics and regulatory law, could not exceed the additional value that Wabash has for the Members. If rates were set at a level that exceeded this additional worth to the Members, this would dictate that the Members purchase power from other sources at lower rates. In other words, it would not make economic sense for the IURC to keep Wabash or its new owner "viable" if the result were to raise rates to its ultimate consumers above the level available from other utilities. This would not-be economically efficient regulation. Based on the testimony of Lewellen, Olley, and Gloria, $450 million is more than twice the $221.7 million maximum value that can reasonably be presented to the IURC and justified as a Wabash viability case.

194. It simply is not enough for REA and its witnesses to construct hypothetical rate increases that, along with REA's exaggerated load growth as-

sumptions, produce imaginary income streams that REA then discounts to present values ranging from $450 to $975 million. Even if REA could implement its assumed rate increases solely to collect the Marble Hill debt (which it clearly cannot), REA has failed to present any evidence that even suggests that a willing buyer would assume that *it* could impose such rate increases when acquiring Wabash as a going concern. Nor does REA demonstrate how such an acquisition could benefit the willing buyer's current ratepayers. This fundamental fault in REA's valuation analysis does not appear to concern REA because REA plans to liquidate Wabash if REA cannot implement its hypothetical rates or if its load growth assumptions are not realized. The Court, however, must determine what is a reasonable estimate of Wabash's going concern value for purposes of deciding which reorganization plan is feasible, fair and equitable.

C. SPECIFIC FINDINGS THAT WABASH HAS A FAIR MARKET VALUE AS A GOING CONCERN OF NO MORE THAN $190 MILLION

195. Based on the valuation evidence presented by the parties, and the Court's findings with respect to the unique characteristics of Wabash, the Court concludes that Wabash's fair market value as a going concern does not exceed $190 million.

196. The Court finds most credible the opinion of Gross that Wabash has a fair market value as a going concern of $190 million.

197. Gross used a discounted cash flow methodology. This method of valuation is predicated on the theory that the value of an ongoing business is based upon the future benefits (expressed in terms of cash

flow) discounted back to the present value using an appropriate discount or capitalization rate.

198. The Court is mindful of the Seventh Circuit's observation in *Metlyn Realty Corp.v. Esmark, Inc.*, 763 F.2d 826 (7th Cir. 1985), that "the process of valuation is inexact" (830) and that a discounted cash flow valuation is "highly sensitive to assumptions about the firm's costs and rate of growth, and about the discount rate." (835) Moreover, this Court "is not required to accept an appraiser's opinion if it is contrary to [the Court's] own judgment on value." *Orth v. Commissioner of Internal Revenue*, 813 F.2d 837, 842 (7th Cir. 1987).

199. While it is difficult to put a fair market value on Wabash because there is no real market for such a unique entity, the Court believes that Gross used the appropriate assumptions and made the most accurate estimate of Wabash's going concern value in traditional hypothetical terms.

200. Due to Wabash's status as a non-profit public utility, it may not represent the typical willing seller motivated to sell at the highest price, though the Court must look at a hypothetical seller. On the other side of the hypothetical sales transaction, the Court cannot conceive of a typical willing buyer, being profit motivated, that would purchase Wabash in its current not-for-profit form. Given Wabash's unique circumstances, the Court finds that it was appropriate for Gross to utilize the Court as a surrogate for the willing seller and to assume that the willing buyer would be an IOU.

201. A for-profit IOU would not purchase Wabash unless it reasonably believed that it could convert Wabash into a for-profit entity, recover the purchase price through rates approved by the IURC, and make

a profit on its acquisition investment. The conversion or merger process, including renegotiated Supply Contracts and new Articles of Incorporation, would require the consent and cooperation of the Members. Because the Members could purchase power from their host IOUs at average embedded cost if Wabash were dissolved, they would have substantial leverage in this negotiation process. Gross described the above obstacles confronting the willing buyer as the "valuation chasm," and he assumed that the "valuation chasm" could be crossed if the rates to the Members did not exceed the prevailing IOU rates. Gross' going concern value of $190 million is based on some rather strained assumptions that the Supply Contracts may be renegotiated, that Wabash's Members will permit the utility to be changed into a for-profit organization, that the Members will cede control of Wabash, and that the IURC will permit the willing buyer to collect additional rates to recover its investment in Wabash. Gross properly discounted for these risks in arriving at the $190 million going concern value; however, the Court still has some reservations whether the Members would renegotiate the Supply Contracts and whether the IURC would grant the willing buyer a rate increase that, indirectly, pays Marble Hill debt. Nevertheless, in its role as surrogate for the willing seller, the Court finds that $190 million is the maximum value that could be negotiated with a willing buyer. This finding is reinforced by the market tests performed by Pratt, which demonstrated that the maximum going concern values of comparable assets, not in bankruptcy, is within the range of 1.24 to 1.35 times the book value of the assets. Pratt's market tests indicate a maximum

going concern value for Wabash between $186 million and $202.5 million.

202. Much of the conflicting evidence heard by the Court concerned the power cost forecasts prepared by Wabash and REA. Generally, REA projects higher costs for Wabash because it projects higher load growth, inflation, costs for unit retirements, and costs for power from Hoosier. Under REA's approach to valuation (but not under Wabash's approach) higher costs lead directly to higher cash flows, which biases the REA study and overstates value. The disagreement over Wabash's future costs, however, does not disturb the $190 million estimate because higher costs would be reflected in both the with-Wabash and without-Wabash studies, with no measurable effect on the cost savings achieved by Wabash (its "cash flows") and the consequent value. Moreover, the higher power supply costs projected by REA would not be a benefit to a hypothetical buyer unless such buyer could increase revenues to cover these costs *and* earn a profit.

203. While the Court does not think it is necessary to resolve all the conflicts in the opinions regarding Wabash's future costs, the Court finds that the weight of the evidence clearly supports Wabash's projections on each of the four factors that explain nearly all of the differences between the Wabash and REA power cost studies.

204. The Court's finding is based particularly on the following: (1) both Wabash and REA relied on SUFG as a neutral and reliable source of load forecast information, but Wabash's load forecast approximates the most current 1990 SUFG load forecast while REA relies on a 1988 SUFG study that had predicted higher load growth; (2) Wabash's load

forecast of 1.61% equals the average load growth projected by Burns & McDonnell for the host IOUs supplying the same service territory as Wabash; (3) whereas SUFG and Wabash project negative real price growth rates for Wabash and the host IOUs, REA projects positive real price growth rates for such utilities; (4) the issue of unit retirements is essentially moot because the Wabash study includes an equivalent amount of capital expenditures for refurbishments; and (5) REA incorrectly assumed that the cost of power from Hoosier would escalate when the evidence indicates that Hoosier itself projects that its price to Wabash will remain flat.

205. Utilizing the going concern value of $190 million, the total value of Wabash's assets for purposes of 11 U.S.C. §§ 506(a) and 1129(b) is approximately $431,940,000.00, summarized as follows:

Going Concern Value	$ 190,000,000.00
PSI Settlement	170,000,000.00
S & L Settlement	15,000,000.00
Marble Hill real estate and personal property, Marble Hill Salvage Account, Marble Hill Contractor Escrow Account, Marble Hill to Columbus Line, and 765 KV Switchyard (per stipulation, Dr. Ex. 1)	29,800,000.00
Investment Accounts	19,000,000.00
CFC Investments	8,000,000.00
Vehicles	140,000.00
	$431,940,000.00

206. Based on the above values and the amounts of their claims, REA and CFC are undersecured.

VII. FINDINGS THAT VALUE OF WABASH TO THE MEMBERS IS $221.7 MILLION

207. The Court finds that Wabash has an additional value of $31.7 million to its Members above its fair market value as a going concern, or a total value of $221.7 million.[24]

208. Because of the strained assumptions required to put a market value on Wabash in a hypothetical sales transaction, and consistent with the objective to determine its maximum value as a going concern for creditors, Wabash presented evidence of what Wabash was worth to its Members in its current form.

209. The Court agrees with Lewellen and Olley that Wabash is clearly more valuable to the Members than to any other buyer, and that such value is properly measured through the cost savings (or benefits) approach. Lewellen obtained the cost savings information from Wabash's power cost study, Dr. Ex. A-I, which compares the Members' costs both with and without Wabash, and in the latter study, assumes that the Members purchase their power from the host IOUs. The Court previously approved Wabash's assumption that the Members could purchase power from the host IOUs at average embedded cost, and found Wabash's power cost study to be more reliable than REA's study, REA Ex. B-28. Based on these prior findings, the Court now finds that Lewellen properly valued the correct cost savings (or benefits) in arriving at the value of $221.7 million. The Court also finds that the value of $221.7

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[24] If there were an auction, of course, it is likely that Wabash's Members would bid only $1.00 more than the next highest bidder, or $190,000,001.00. But Wabash is offering to pay the full value to make certain it can exit bankruptcy.

million would not substantially change if REA Ex. B-28 were utilized, because the primary factors on which the parties disagree—load growth, inflation rate, unit retirements and Hoosier costs—would simply increase the overall costs in both the with-Wabash and without-Wabash scenarios, with no substantial net impact on the *cost savings*.

210. Even were the Court to accept REA's contentions that Wabash has underestimated any one of the components that determine its future power costs, and that such factors affect only the costs of Wabash, that calculation would narrow the difference between the cost of power to Members with and without Wabash, with a consequent reduction in the cost savings realized by the Members, i.e., the additional value of Wabash to its Members. Thus, the Court finds that REA's quarrels with Wabash's underlying power cost study merely confirm the fact that Lewellen has placed the maximum value upon Wabash that can be achieved for the benefit of creditors.

211. The Court has found that Lewellen properly measured the cost savings, or benefits, of Wabash to the Members, but the question remains whether, in light of the Rate Case, the IURC would allow Wabash to increase its rates for the purpose of paying $221.7 million to REA and CFC. The payment of $221.7 million to REA and CFC would represent the payment of $69.4 million over and above Wabash's current debt that is associated with used and useful assets (i.e., $152.3 million). While Indiana law clearly precludes a Marble Hill-related rate increase, both Wabash and REA presented evidence suggesting that the IURC would approve a "viability" rate increase.

212. Based on Gloria's testimony, and what occurred in the PSI Case, it seems likely that the

IURC would grant Wabash a viability rate increase if, after engaging in a cost benefit analysis, the IURC conluded that such rate increase was in the best interests of the ultimate consumers. There is no evidence that the IURC could or would grant such a viability increase to REA or any buyer of Wabash.

213. The testimony of Lewellen and Olley quantifies the upper limit of the viability rate increase that the IURC is likely to approve for Wabash. The Lewellen-Olley analysis identifies the maximum economic benefit (i.e., present and future cost savings) that Wabash can produce for its Members (and ultimately for the retail consumers). The IURC, similarly, would regard this as the rate ceiling that it could authorize for Wabash and that will still produce a benefit for the Members. To raise rates beyond this level would, by definition, be punitive and conf iscatory. In the final analysis, Lewellen's value of $221.7 million identifies "the maximum value you could possibly squeeze out . . . of [the Members] before it would pay them to go find other arrangements." C/V T. p. 718.

214. Based on the foregoing, the Court believes it is reasonable to expect that the IURC would grant Wabash a viability rate increase for the purpose of paying $221.7 million to REA and CFC. However, the IURC would approve such a rate increase only as part of a feasible plan which would allow Wabash to exit bankruptcy. This issue of plan feasibility is discussed below.

215. It is important to distinguish the Gross and Lewellen valuations. Gross' fair market value of $190 million represents the amount which secured creditors could expect to receive following a sale of Wabash as a going concern; thereofore, such value satisfies

the requirements of 11 U.S.C. §§ 506(a) and 1129(b)(2)(A). In contrast, Lewellen's value of $221.7 million defines the upper limit on the value that Wabash could present to the IURC as justification for a viability rate increase. The significance of the Lewellen value from a bankruptcy perspective is that, by paying such amount to creditors, Wabash has assured that the creditors are receiving the maximum amount possible for purposes of 11 U.S.C. § 1129(b)(2)(B).

VIII. THE WABASH PLAN

216. As described in detail below, creditors under the Wabash Plan will receive approximately $457,334,645.00. Thus, creditors will receive more under the Wabash Plan than they would in a liquidation.

217. Article II of the Wabash Plan classifies the claims and interests as follows: Class 1 - Administrative Claims; Class 2 - Secured Claim of REA on the Generation and Transmission Assets (estimated to be $182,390,500.00); Class 3 - Secured Claim of CFC on the Generation and Transmission Assets (estimated to be $7,609,500.00); Class 4 - Secured Claims of REA and CFC on the Investment Accounts (estimated to be $18,239,050.00 an $760,950.00, respectively); Class 5 - Secured Claim of REA on the *Timbers* Account (these funds were paid to REA, see § 221, *infra.)*; Class 6 - Secured Claims of REA and CFC on the Marble Hill Assets (estimated to be $199,519,588.00 and $8,324,141.36, respectively); Class 7 - CFC's Set-Off Claim (estimated to be $8,162,899.04); Class 8 - Unsecured Claims less than $25,000.00 (estimated to be $21,788.47 in the aggregate); Class 9 - Claims of PSI (estimated to be between $29,586,678.00 and

$110,000,000.00); Class 10 - Unsecured Claims of REA and CFC (estimated to be $271,000,000.00 and $12,000,000.00, respectively); Class 11 - Claims of Members (estimated to be $7,184,740.07); and Class 12 - Interests of the Members.

218. Classes 2, 3, 4, 6, 9, 10, 11 and 12 are impaired under the Wabash Plan. Classes 1, 5, 7 and 8 are not impaired.

219. Of the impaired classes of claims, Classes 2 (REA), 3 (CFC), 4 (REA and CFC), 5 (REA), 6 (REA and CFC) and 10 (REA and CFC) voted to reject the Wabash Plan. Classes 9 (PSI) and 11 (Members' claims) voted to accept the Wabash Plan.

220. Class 12 (Members' interests) voted to accept the Wabash Plan by a vote of 21 to 3.

221. REA's claim as of the Petition Date (which totals approximately $670 million before adjustments) is dealt with in Classes 2, 4, 5, 6 and 10. Under Class 2, REA's secured claim for $182,390,500.00 (representing REA's pro rata interest in the assets comprising the going concern value) is to be satisfied by 1) the prior payment of $28,928,693.22 from the Timbers Account and 2) a new promissory note in the amount of $153,461,806.78, secured by a new first mortgage on the Generation and Transmission Assets and to be paid in full over 35 years, with quarterly payments of principal and interest. Under Classes 4 and 6, REA is to receive its portion of cash from various sources, including the Investment Accounts and Marble Hill Assets (payments totalling $217,758,638.00). The Wabash Plan estimates that the dividend distribution to REA with respect to its Class 10 deficiency claim (estimated to be $271,000,000.00) will be approximately $30,489,984.00. Thus, REA is to receive $430,639,122.00 under the Wabash Plan in addition to

the $36.5 million that Wabash voluntarily paid REA subsequent to the Petition Date (see Findings, 123, *supra*).

222. CFC's claim as of the Petition Date (which totals approximately $35,491,876.29 before adjustments) is dealt with in Classes 3, 4, 6, 7 and 10. Under Class 3, CFC's secured claim for $7,609,500.00 (representing CFC's pro-rata interest in the assets comprising the going concern value) shall continue to be represented by the existing Bonds, shall be secured by a new first mortgage on the Generation and Transmission Assets and shall be paid in full over 23 years, with quarterly payments of principal and interest. Under Classes 4 and 6, CFC is to receive its portion of various cash assets, including the Investment Accounts and Marble Hill Assets (payments totalling $9,085,091.00). Under Class 7, CFC is entitled to set-off its Marble Hill claim against Wabash's investments in CFC (valued at approximately $8,162,899.04). The Wabash Plan estimates that the dividend distribution to CFC with respect to its Class 10 deficiency claim (estimated to be $12,000,000.00) will be approximately $1,350,016.00. Thus, CFC is to receive $26,207,506.00 under the Wabash Plan in addition to the $12 million that Wabash voluntarily paid CFC subsequent to the Petition Date (see Findings, 24, *supra*).

223. The Wabash Plan provides that Class 8 unsecured creditors having claims less than $25,000.00 shall be paid in full on the Effective Date. The total amount of claims in Class 8 is approximately $22,000.00.

224. PSI's unsecured claims (ranging from an alleged liquidated amount of $29,586,678.00 to an alleged contingent amount of $110,000,000.00) are

dealt with in Class 9. The Wabash Plan provides that PSI shall receive $466,017.00, payable in equal installments over five years without interest.

225. The Members' unsecured claims for patronage capital ($7,184,740.07 in the aggregate) are dealt with in Class 11. The Wabash Plan provides that the Members' claims shall be reduced by the same percentage that Class 10 claims are not paid. Any remaining claims will only be paid, if at all, at some indeterminate future date when permitted by Wabash's By-laws.

226. The Members' interests in Wabash are dealt with in Class 12. The Wabash Plan provides that the Members shall not receive or retain any property under the Plan on account of their interests, and that upon the Date of Confirmation, the interests of the Members shall terminate.

227. Wabash estimates that payments under the Wabash Plan will require a rate increase of 4.2% above current rate levels, plus utilization of the excess revenues (approximately 9.6%) currently being collected. Wabash Plan, Art. VII. Pursuant to 11 U.S.C. § 1129(a)(6), Wabash has requested that confirmation of its Plan be made conditional on the IURC and MPSC approving any rate increase required by the Wabash Plan. Conf. T. I., p. 81-82.

228. Article IX of the Wabash Plan contains the essential means for executing the Plan. First and foremost, § 9.1 provides that Wabash shall assume the Supply Contracts with the Members in order to generate the revenues necessary to fund the Wabash Plan. The assumption of the Supply Contracts will obligate the Members to fulfill all of their covenants thereunder, and will also entitle the Members to-the benefit of all rights thereunder, including the right to

select Wabash's Board of Directors. In order to enhance the feasibility of the Wabash Plan, §§ 9.2-9.5 provide that the Members shall make the following capital contributions (on a per capita basis): a) $3,213,346.00 payable in cash, or through rates over 12 months ("Phase I" capital); b) up to $5.5 million payable in cash or through rates on an "as needed" basis, determined by the Wabash Board ("Phase II" capital); c) waive any claim to the Investment Accounts (approximately $19 million); and d) waive any claim to reimbursement of the PSI Litigation costs (approximately $18 million).

229. The amount of the Phase I capital contribution was derived from the amount allowed by the IURC as a capital reserve in Wabash's 1983 rate case for extensions and replacements of plant. Conf. T. I., p. 74. However, the Phase I capital contribution of $3.2 million is independent from, and in addition to, the capital reserve previously allowed by the IURC. Conf. T. 1., p. 159-60. The Members have the option of making the Phase I capital contribution in a lump sum or through rates collected over 12 months, Conf. T. I., p. 76-77; however, the Court may order that the cash payment be made promptly after the Effective Date if necessary to confirmation. Wabash Plan, § 9.4.

230. The amount of the Phase II capital contribution represents approximately one quarter's debt service payment under the Wabash Plan. Conf. T. 1., p. 75. The Phase II capital contribution will serve as "a back up position that [Wabash] would utilize in the event that it could not obtain necessary funds for the continuation of the business's activities." Conf. T. 1., p. 75. If a financial emergency arises within ten years after the Effective Date, Wabash would have the right

to collect up to $5.5 million from the Members, either through rates or cash payments. Conf. T. 1., p. 77.

IX. THE REA PLAN

231. The REA Plan classifies the claims and interests as follows: Class 1: REA and CFC Secured Claims; Class 2: CFC Setoff Claim; Class 3: Claims of PSI; Class 4: Priority Claims; Class 5: Unsecured Claims of $20,000.00 or less; Class 6: Unsecured Claims In Excess of $20,000.00 (REA and CFC); Class 7: Post-Petition Interest Claims (REA and CFC); Class 8: Equity Interests and REMC Member Claims. REA Plan, Art. 2.

232. The thrust of the REA Plan is to take control of and, if necessary, liquidate Wabash. To accomplish this, the REA Plan provides that preferred stock shall be issued to REA and CFC, with one share of stock being distributed for each dollar of debt. The preferred stockholders would be given all of the rights which the Members now have, including the right to elect Wabash's Board of Directors. REA Plan, Art. 12. However, the REA Plan provides that the Members shall retain their interests in Wabash. REA Plan, Art. 10.

233. An essential aspect of the REA Plan is REA preemption of the IURC and the MPSC. C/V T. p. 1348.

234. Notwithstanding that the REA Plan requires a takeover of the Wabash Board and the preemption of the state regulatory commissions, the Plan provides for the assumption of the Supply Contracts. REA Plan, § 18.1.

235. The REA Plan provides that REA and CFC are to be paid in full (including post-petition and post-confirmation interest). REA Plan, Arts. 3, 8, 9. REA

estimates that the total debt to REA and CFC is approximately $1 billion. Dr. Ex. S; REA Ex. 31; C/V T. p. 1434. The REA Plan provides that the claims of REA and CFC will be paid in full through deferred payments over the next thirty-seven (37) years, ending in 2027.

236. The REA Plan provides that the secured claims of REA and CFC shall be evidenced by Secured Promissory Notes, to be executed on the Effective Date, in amounts equal to such creditors' Allowed Secured Claims. REA Plan, § 3.1. If the value of the Secured Collateral (and thus the amount of the Allowed Secured Claims) has not been determined by a Final Order as of the Effective Date, the REA Plan provides that the Secured Promissory Notes shall be executed in the "amount of the value of the Secured Collateral, as determined by the Bankruptcy Court prior to the Effective Date." *Id.* at § 3.3. The REA Plan also provides for the issuance of Unsecured Promissory Notes and Post-Petition Interest Promissory Notes to REA and CFC, in amounts equal to their Allowed Unsecured Claims and Allowed Post-Petition Interest Claims. *Id.* §§ 8.2, 9.2. The various notes are all payable quarterly, with interest compounded annually, and may be accelerated upon any default under the REA Plan. REA Plan, Exs. A, B, and C.

237. To be able to make the deferred payments mentioned above, the REA Plan proposes a series of rate increases. First, the REA Plan provides for three (3) successive nine percent (9%) rate increases over a two (2) year period which, compounded, is approximately 29.5%. Second, the REA Plan provides for a four percent (4%) rate increase in any year following a year in which all of the scheduled pay-

ments are not made and load growth is not less than zero. REA estimates that Wabash must sustain an annual average load growth of 3% to avoid the additional 4% rate increases. C/V T. p. 1434.[25] Third, the REA Plan provides that Wabash must seek additional rate increases to cover increases in operating expenses. REA Plan, Art. 14.

238. The rate increases proposed in the REA Plan are to pay all of the Marble Hill debt, including post-petition and postconfirmation interest.

239. The REA Plan contemplates that after confirmation Wabash will seek regulatory approval of all rate increases required by the Plan; however, REA does not identify the entity having jurisdiction over Wabash's rates. REA Plan, Art. 17. In the event the proposed rate-increases are not approved by December 31, 1991, Wabash is to be liquidated. *Id.* § 23.4.

240. The REA Plan provides that all of Wabash's cash (except for $3.2 million dollars) is to be distributed to REA and CFC and that the proceeds from the PSI Settlement and S & L litigation will be deposited into a reserve fund for creditors and/or used to make the deferred payments to the extent necessary. REA Plan, §§ 3.10, 16.2.

241. Despite the facts that PSI rejected the REA Plan, PSI's claims have never been disallowed, and the PSI Settlement is contingent on confirmation of the Wabash Plan, the REA Plan purports to assume and adopt the PSI Settlement. REA Plan, § 13.2. Most importantly, the REA Plan provides that PSI

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[25] As noted above, REA is projecting 2.94% load growth, Wabash is projecting 1.61% and SUFG is projecting 1.94%. Under any of the load growth projections, the six additional 4% rate increases are required under the REA Plan.

shall pay $170 million to REA and CFC. *Id.* § 3.10. In addition, the REA Plan proposes to pay PSI $466,017.00 over five years without interest, in full satisfaction of PSI's filed claims which total as much as $110 million. *Id.* § 5.2.

242. The REA Plan classifies the Members' claims and interests into a single class, REA Plan, (2.8, and provides that the claims are not to be paid unless and until all other claims are paid. *Id.* § 10.2. Although the REA Plan provides that the Members shall retain their interests in Wabash, it strips the Members of their right to elect the Wabash Board of Directors, and gives these rights to the preferred shareholders (i.e., REA and CFC). *Id.* § 10.1.

243. REA did not identify those individuals who would serve as officers and directors of Wabash under the REA Plan, nor has REA identified the nature of their compensation. Heath testified that although REA had begun the process of identifying the types of individuals which REA would like to serve on the Wabash Board, no specific individuals have yet been selected. Conf. T. III., p. 147-150; C/V T. p. 1365-66.

244. The REA Plan provides that Wabash may be liquidated for any reason at any time, at the discretion of REA, and shall be liquidated if all claims are not paid in full, with interest, by 2027. REA Plan, § 15.6, Art. 23. Neither the REA Plan nor any evidence presented at the confirmation hearing explains how Wabash would be liquidated. T. III., p. 126. Additionally, the REA Plan proposes to terminate this Court's jurisdiction prior to the liquidation of Wabash. REA Plan, Art. 27

245. The REA Plan provides that all creditors and Members are impaired under the REA Plan. REA Plan, Art. II. PSI and all 24 Members voted to reject

the REA Plan. CFC did not vote on the REA Plan. Only REA voted to accept the REA Plan.

246. Factual statements contained in the Conclusions of Law shall stand as additional Findings of Fact.

CONCLUSIONS OF LAW

I. JURISDICTION AND BURDEN OF PROOF

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b) (2) (L).

2. The Court may confirm a plan under 11 U.S.C. § 1129 only if all of the requirements found therein are satisfied. One of the requirements of § 1129(a) is that each class of claims or interests either accept the plan or not be impaired by the plan. 11 U.S.C. § 1129(a)(8). If, as in the case of the Wabash Plan and REA Plan, an impaired class does not accept the plan, the plan may still be confirmed pursuant to 11 U.S.C. § 1129(b) ("cram down"). However, all of the other requirements of § 1129(a) and (b) must be met. *Matter of Johns-Manville Corp.*, 68 B.R. 618, 629 (Bankr. S.D. N.Y. 1986), *aff'd*, 843 F.2d 636 (3d Cir. 1988) (hereinafter cited as "*Manville*").

3. Although the plan proponent bears the ultimate burden of proving that the plan complies with 11 U.S.C. § 1129, parties who file objections have the burden of going forward with evidence supporting their objections. *In re Future Energy Corp.*, 83 B.R. 470, 481 n.21 (Bankr. S.D. Ohio 1988).

II. THE WABASH PLAN IS CONFIRMABLE

A. REQUIREMENTS OF 11 U.S.C. § 1129(a)

1. § 1129(a)(1)

4. Under § 1129(a)(1), the Court may confirm a plan only if it complies with the applicable provisions of Title 11. REA and CFC objected to a prior version of the Wabash Plan because it allegedly improperly classified the unsecured claim of CFC, in violation of 11 U.S.C. § 1122. The current Wabash Plan classifies the unsecured claims of REA and CFC together; therefore, these objections are moot.

5. REA objected to a prior version of the Wabash Plan because it allegedly failed to estimate the value of the claim against S & L. Subsequent to this objection, Wabash entered into the S & L Settlement; therefore, this REA objection is moot.

6. REA objected to a prior version of the Wabash Plan because it proposed to reimburse the Members for litigation expenses incurred in pursuing S & L, and to pay the *net* recovery from S & L to REA and CFC. The current Wabash Plan proposes to pay the gross amount of the S & L Settlement to REA and CFC; therefore, this objection is moot.

7. REA objects to the Wabash Plan because it fails to allow "over $200 million in post-petition guarantee payments made by REA to" FFB, allegedly in contravention of 11 U.S.C. § 502(e)(2). Because REA is undersecured, it is not entitled to post-petition interest. *United States v. Timbers of Inwood Forest*, 484 U.S. 365 %1988). REA's reliance on 11 U.S.C. § 502(e)(2) to characterize its post-petition payments to FFB as something other than interest is misplaced. Section 502(e)(1)expressly provides that "[*n*]*otwithstanding*

. . . *paragraph (2) of this subsection*, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that - (A) such creditor's claim against the estate is disallowed." 11 U.S.C. (502(e)(1)(A) (emphasis added). Thus, according to the plain language of the statute, REA's § 502(e)(2) claim for contribution under its guaranty shall be disallowed to the extent that FFB's claim would be disallowed. Since FFB's claim for post-petition interest is not allowable, *a fortiori*, REA's claim for contribution is not allowable.

8. REA objects to the manner in which the Wabash Plan proposes to apply the funds recently paid to REA from the Timbers Account. *See* Wabash Plan, (3.2a. The "Timbers Account" was aptly named because it contained post-petition debt service payments on REA's non-Marble Hill claim—payments which, under the holding in *Timbers*, need not be made to undersecured creditors such as REA. Since, under *Timbers*, REA is not entitled to the payment of post-petition interest, the funds paid to REA from the Timbers Account must reduce REA's pre-petition claim. The weight of authority would support the application of such funds to the *secured* portion of REA's pre-petition claim. *See, e.g., In re Maun*, 95 B.R. 94 (Bankr. W.D. Mich. 1987); *In re Canaveral Seafoods, Inc.*, 79 B.R. 57 (Bankr. M.D. Fla. 1987). Wabash's application of the funds to reduce the secured portion of REA's pre-petition claim is consistent with the Court's Judgment entered on July 19, 1990 (see Findings, 23, *supra*); therefore, the Court rejects this REA objection as unfounded.

9. Having dealt with the objections raised under § 1129(a)(1), the Court further concludes that the

Wabash Plan satisfies the requirements of 11 U.S.C. §§ 1122 and 1123. Thus, the Court concludes that the Wabash Plan satisfies § 1129(a)(1).

2. § 1129(a)(2)

10. Section § 1129(a)(2) requires that the plan proponent comply with the applicable provisions of Title 11. Objections to confirmation raised under § 1129 (a)(2) generally involve the alleged failure of the plan proponent to comply with § 1125 or § 1126. *Manville*, 68 B.R. at 630. No objections to the Wabash Plan were based on § 1129(a)(2), and the Court concludes that Wabash has complied with all applicable provisions of Title 11.

3. § 1129(a)(3)

11. Under Section 1129(a) (3), a plan must be proposed in good faith and not by any means forbidden by law. The focus of the good faith requirement found in § 1129(a)(3) is strictly limited to the contents of the proposed plan. *In re Madison Hotel Associates*, 749 F.2d 410, 424-25 (7th Cir. 1984); *In re Cherry*, 84 B.R. 134, 137 (Bankr. N.D. Ill. 1988). Thus, the plan proponent's conduct (aside from the contents of the proposed plan) is irrelevant to the good faith inquiry under § 1129(a)(3). REA objects to the Wabash Plan because Wabash has allegedly acted in bad faith. All of REA's allegations of bad faith concern actions and legal positions taken by Wabash in the Chapter II case, Valuation Case, Rate Case, and in *Wabash v. REA (I)*. Because none of REA's allegations concern the contents of the Wabash Plan, this REA objection is unfounded. Furthermore, the pursuit of legal positions which are sustained by the courts does not constitute bad faith for purposes of § 1129(a)(3). The

Court concludes that Wabash has not acted in bad faith and that the Wabash Plan was proposed in good faith.

12. Fruit Belt objects to the Wabash Plan under § 1129(a)(3) because "there is no legal basis to require a Member to make a contribution against its will." The Court notes that Fruit Belt was one of only three Members to reject the Wabash Plan. Article IX of the Wabash Plan provides that the Members' capital contributions may be collected through rates which must be approved by the IURC and MPSC. Any capital contributions collected by rates would, by definition, be pursuant to valid state regulatory law. Thus, Fruit Belt's objection is without merit. The Court concludes that the Wabash Plan satisfies § 1129(a)(3).

4. § 1129(a)(4)

13. Section 1129(a) (4) requires, inter alia, that any payment made or to be made by the plan proponent for services or for costs and expenses in connection with the case or plan be approved by the court as reasonable. No objections were filed under § 1129(a)(4), and the Court concludes that all relevant payments contemplated by this Section have been or will be made subject to this Court's approval. Thus, the Wabash Plan satisfies Section 1129(a)(4).

5. § 1129(a)(5)

14. Section 1129(a)(5) requires, inter alia, that the plan proponent disclose the identity of those individuals proposed to serve as directors and officers of the debtor following confirmation, that the appointment of such individuals to such offices be consistent with the interests of creditors, equity security holders and

public policy, and that the plan proponent disclose the identity of any insiders to be retained by the reorganized debtor, and the nature of any compensation for such insiders. No objections were filed under this Section. Through its Plan and evidence admitted at the confirmation hearing, Wabash identified its proposed officers and directors, as well as the nature of their compensation. The Court concludes that the continuance of Wabash's officers and directors serves the interests of the creditors, Members and public policy, and that § 1129(a)(5) has been satisfied in all other respects.

6. § 1129(a)(6)

15. Section 1129(a)(6) requires that any rate changes proposed in the plan be approved by the appropriate regulatory commission, or be expressly conditioned on such approval. Only the IUCC filed an objection under this Section, and that objection was subsequently withdrawn. The Court concludes that the Wabash Plan satisfies § 1129(a)(6). *See* Wabash Plan, Art. VII.

7. § 1129(a)(7)

16. Section 1129(a) (7) provides, inter alia, that each holder of an impaired claim or interest must accept the plan *or* receive property under the plan having a value that is not less than the value that the holder of such claim or interest would receive in a Chapter 7 liquidation. The impaired creditors and interest holders who have not accepted the Wabash Plan include REA, CFC, Fruit Belt, Jay County REMC and Wabash County REMC (only in its capacity as a Class 12 interest holder). The Wabash Plan, therefore, must provide each of these entities

with an amount equal to or greater than the amount which such entity would receive in a Chapter 7 liquidation.

17. REA and CFC object to the Wabash Plan under § 1129(a)(7) because Wabash's liquidation analysis does not include any value for the Supply Contracts or other contracts. However, neither REA nor CFC presented any evidence of what the Supply Contracts and other contracts would be worth in a liquidation, and the Court previously found that the Supply Contracts and other contracts have no liquidation value. Such assets have value only as part of Wabash's going concern value. Moreover, this objection would have merit only if the liquidation value of the Supply Contracts and other intangibles exceeded $243,636,628.00—the difference between the Wabash liquidation value ($213,210,000.00) and the value to be paid to REA and CFC ($456,846,628.00). Any value less than $243,636,628.00 would mean that REA and CFC would still be receiving more under the Wabash Plan than they would in a liquidation. Thus, these objections are unfounded.

18. The Wabash Plan proposes to pay $456,846,628.00 to REA and CFC, collectively, which is more than such creditors would receive in a liquidation of Wabash. Therefore, the Wabash Plan satisfies § 1129(a)(7) with respect to REA and CFC. As unsecured creditors and interest holders, the three Wabash Members that did not accept the Wabash Plan would receive the same or less in a Chapter 7 liquidation of Wabash; therefore, the Wabash Plan also satisfies § 1129(a) (7) with respect to said Members.

8. § 1129(a)(8)

19. Section 1129(a)(8), requiring that each class of claims and interests either be unimpaired or accept the plan, is not satisfied because REA and CFC rejected the Wabash Plan. The Wabash Plan, therefore, can be confirmed only if it meets the cram down requirements of § 1129(b), which are discussed hereafter.

9. § 1129(a)(9)

20. Section 1129(a)(9) provides for the appropriate treatment of various priority claims arising under 11 U.S.C. § 507. No objection to confirmation has been raised under this Section. The Wabash Plan satisfies § 1129(a)(9).

10. § 1129(a)(10)

21. Section 1129(a)(10) provides that if a class of claims is impaired under a plan, at least one class of impaired claims must accept the plan, determined without including the acceptance by any insider. No objections to confirmation were filed under this Section. Several classes of claims are impaired by the Wabash Plan; therefore, at least one class of impaired claims must accept the Wabash Plan. Two impaired classes of claims have accepted the Wabash Plan: Class 9 (PSI) and Class 11 (Members). The Court concludes that the Wabash Plan satisfies § 1129(a)(10).

11. § 1129(a)(11)

22. Section 1129(a)(11) concerns the feasibility of a plan, and requires the court to determine whether confirmation is likely to be followed by the liquidation, or the need for further financial reorganization,

of the debtor or any successor to the debtor under the plan. When determining the feasibility of a plan, the Court will "consider [1] the adequacy of the capital structure, [2] the earning power of the business, [3] the economic conditions, [4] the ability of management, [5] the continuity of the present management, and [6] other matters which determine the prospects of a sufficiently successful business operation." *In re Cherry*, 84 B.R. 134, 138 (Bankr. N.D. Ill. 1988). The inquiry for the Court is whether the Wabash Plan offers a "reasonable prospect of success." *Id.* at 138; *Manville*, 68 B.R. at 635.

23. REA, CFC and Fruit Belt objected to a prior version of the Wabash Plan under § 1129(a)(11) on the grounds that the pending appeals in the Valuation Case, Rate Case, and *Wabash v. REA (I)* allegedly made confirmation premature. Those cases have now completed the appellate process; therefore, these objections are moot. To the extent that these objections could also be based on the fact that *Wabash* v. *REA (II)* is pending in District Court, the Court concludes that the feasibility of the Wabash Plan is not adversely affected thereby. Given the standard for testing the feasibility of a plan (i.e., "reasonable prospect of success" and "not likely" to be followed by liquidation or further reorganization), it cannot reasonably be argued that the pending Wabash v. REA (II) precludes a finding that the Wabash Plan is feasible. Although it is "possible" that REA will successfully preempt the IURC, the Court does not consider such a result to be probable, especially given the rejection of REA's first attempt to preempt in *Wabash v. REA (I)*. Other factors, such as future economic conditions, are also difficult to predict with certainty and subject to change, yet the courts rou-

tinely weigh such factors when deciding the feasibility issue. The outcome of *Wabash v. REA (II)* would seem to be relatively easier to predict than future economic conditions. Just as it would be futile to delay confirmation until future economic conditions are known with absolute certainty, it would be futile to delay confirmation until all possible appeals are finally resolved on the preemption issue. Moreover, REA preemption would not necessarily change the conclusion that the Wabash Plan is feasible, so long as the rates are no higher than those charged by the host IOUs.

24. Wabash amply demonstrated the feasibility of its Plan. Lewellen testified that the capital structure of Wabash following confirmation would compare favorably with similarly situated G & Ts. This testimony stands unrebutted. Additionally, notwithstanding its objection, REA admitted that Wabash will be able to make the payments required under the Wabash Plan, and essentially conceded that the Wabash Plan is feasible. Conf. T. II., p. 223; C/V T. p. 1457-59. Further supporting the feasibility of the Wabash Plan is the fact that PSI and 21 of the 24 Members accept the Wabash Plan. PSI's acceptance assures compliance with the PSI Settlement, which will create an additional $170 million for REA and CFC and reduce the claims against Wabash by hundreds of millions of dollars. The Members' acceptance assures a reliable market for Wabash's power, and a source of capital contributions up to $8.7 million. Finally, Wabash will retain its competent and experienced management personnel to provide continuity and additional post-confirmation stabil-

ity.[26] Based on the foregoing, the Court is reasonably assured that confirmation of the Wabash Plan is "not likely" to be followed by liquidation or the need for further reorganization, assuming that the necessary rate increases are approved by the IURC and MPSC.

25. Olley testified that the Wabash Plan is feasible, with the only caveat being whether the IURC and MPSC will allow an increase in revenue requirements to pay an additional $69.4 million in debt resulting from Lewellen's valuation (i.e., $221.7 million, minus $152.3 million in outstanding debt associated with used and useful assets). C/V T. p. 730-31. The Court previously found that the state commissions would likely approve a "viability rate increase" as part of a feasible plan. The terms "feasibility" and "viability" are synonymous in bankruptcy parlance and ordinary usage. *See, e.g., In re A.H. Robins Co., Inc.*, 880 F.2d 769, 776 (4th Cir. 1989) (cases cited therein); *Matter of Sound Radio, Inc.*, 103 B.R. 521, 524 (D. N.J. 1989) (equating "commercial viability" and "feasibility"); *In re Great Northwest Recreation Center, Inc.*, 74 B.R. 846, 852 (Bankr. D. Mont. 1987)

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[26] An important aspect of feasibility is whether the plan proponent has the necessary personnel to implement its plan. Based on the Court's observations of Wabash's management personnel during the course of these hearings, and its review of numerous business transactions brought before the Court for approval, the Court is confident that Wabash has in place the management team necessary to implement the Wabash Plan. Some of current management's accomplishments were summarized by Professor Olley, and include: 1) the breaking of NIPSCO's monopoly in the NIPSCO area, allowing Wabash to wheel cheaper power to the NIPSCO area Members; (2) the PSI and S & L Settlements; and (3) the pioneering of demand side management techniques to reduce peak loads, which has become a model for other utilities. C/V T. p. 733-34.

(same). Therefore, having determined that the Wabash Plan is otherwise feasible *if* the necessary rate increase is granted, the Court has essentially defined the level of rate increase which is necessary to maintain Wabash as a viable entity. Based on the foregoing, the Court has confidence that the necessary rate increase will be granted. In any event, confirmation of the Wabash Plan is expressly contingent upon approval of the necessary rate increases by the IURC and the MPSC. The Court concludes that the Wabash Plan satisfies § 1129(a) (11).

12. § 1129(a)(12)

26. Section 14.2 of the Wabash Plan satisfies § 1129(a)(12), requiring the payment of bankruptcy fees owed pursuant to 28 U.S.C. (1930.

13. § 1129(a)(13)

27. Section 14.3 of the Wabash Plan satisfies § 1129(a)(13), requiring the continuance of retiree benefits after the Effective Date in compliance with 11 U.S.C. § 1114.

28. With the exception of § 1129(a)(8), the Wabash Plan satisfies all of the requirements of § 1129(a). The Court must now consider the requirements of § 1129(b).

B. REQUIREMENTS OF 11 U.S.C. § 1129(b)

1. § 1129(b)(1)

29. Section 1129(b)(1) provides, inter alia, that a plan may not "discriminate unfairly" and must be "fair and equitable" with respect to each class of impaired claims or interests that has not accepted the plan. The "unfair discrimination standard" of § 1129(b)(1) generally "ensures that a dissenting class

will receive relative value equal to the value given to all other similarly situated classes." *Manville*, 68 B.R. at 636.

30. REA and CFC objected to a prior version of the Wabash Plan under § 1129(b)(1) because the Plan allegedly discriminated unfairly against REA by separately classifying, and giving more favorable treatment to, CFC's unsecured claim. The current Wabash Plan classifies the unsecured claims of REA and CFC together and treats said claims equally. Thus, these objections being moot, the Court concludes that the Wabash Plan does not unfairly discriminate against any impaired class of claims or interests which has not accepted the Plan.

2. § 1129(b)(2)(A)

31. Section 1129(b)(2) describes the meaning of "fair and equitable" with respect to secured claims, unsecured claims, and interest holders. Under section 1129(b)(2)(A), the condition that a plan be fair and equitable to a class of *secured claims* may be satisfied if the plan provides -

> (i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> > (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totalling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

32. REA objected to a prior version of the Wabash Plan under § 1129(b)(2)(A) because the Plan proposed to pay approximately $11 million to CFC on account of its unsecured claims. REA's objection was based on the assumption that the $11 million represented cash collateral that was inappropriately being diverted to pay an unsecured claim. The objection is moot since the current Wabash Plan eliminates the $11 million payment to CFC.

33. REA also objected to the Wabash Plan under § 1129(b)(2)(A) because the Plan "limits" REA's lien to the Generation and Transmission Assets. Under Section 1.15 of the Wabash Plan, the term "Generation and Transmission Assets" is defined as including *all* Wabash assets except motor vehicles (which were excluded from the REA Mortgage) and except for those assets to be turned over to REA and CFC (primarily cash). Thus, as REA conceded at the confirmation hearing, the Wabash Plan does not exclude any assets from REA's lien. Conf. T. II., p. 96-102.

34. REA also objects to the Wabash Plan under § 1129(b)(2)(A) because the Plan proposes to alter the terms of the REA Mortgage and note. Under (§§ 1123(a)(5)(E), (F) and 1129(b)(2)(A), Wabash may modify the terms of the REA Mortgage and note as long as REA (a) retains its lien and (b) is to receive

the present value of its secured claim. This is all that a secured creditor is entitled to under the Code. *See In re Hollanger*, 15 B.R. 35, 47 (Bankr. W.D. La. 1981); *In re Coastal Equities, Inc.*, 33 B.R. 898 (Bankr. S.D. Cal. 1983); *In re EastLansing 30 Associates*, 47 B.R. 593 (Bankr. W.D. Mich. 1985). Moreover, the Wabash Plan provides that this Court shall retain jurisdiction to deal with the terms of the new mortgage. The Court concludes that the Wabash Plan satisfies § 1129(b)(2)(A).

3. § 1129(b)(2)(B)

35. Under § 1129(b)(2)(B), the condition that a plan be fair and equitable to a class of *unsecured claims* is satisfied if -

> (I) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

36. Under the Wabash Plan, Class 10 unsecured creditors (i.e., REA and CFC) are not to be paid in full; therefore, the Plan must comply with the so-called "absolute priority rule" found in § 1129(b)(2)(B)(ii). *But see In re Independence Village, Inc.*, 52 B.R. 715 (Bankr. E.D. Mich. 1985) (calling into question whether absolute priority rule has any application to a not-for-profit corporation). Under the absolute priority rule, the Members, as the Class 12 interest holders, may not "receive or retain . . . any

property's under the Wabash Plan "on account of such junior . interest." REA objects to the Wabash Plan because it allegedly violates the absolute priority rule.

37. For the reasons stated below, the Court finds that Wabash's Plan is fair and equitable with respect to the impaired class of unsecured claims that has not accepted the Plan.

38. It is necessary to make a few preliminary observations based upon the evidence submitted by the parties that relate to the issue of whether the Wabash Plan is fair and equitable to unsecured creditors. First, this is a case where the exclusive period for the debtor to propose a reorganization plan has long since expired. Here, both the debtor and its principal creditor have had ample opportunity to develop and propose competing plans. Second, this is not a case where there is a dispute whether the debtor is merely a corporate corpse without any value as a going concern. On the contrary, Wabash has submitted evidence that $190 million is its fair market value, while REA has proposed rate increase scenarios that it contends yield fair market values of $450 million and $750 million, depending upon whether REA can preempt IURC regulation of Wabash's rates. Third, there has been a de facto auction of Wabash. The Court takes notice of the fact that there has been extensive publicity regarding Wabash's status since its May 1985 bankruptcy filing. Notwithstanding such publicity, REA identified only three expressions of interest by other utilities in acquiring Wabash. Specifically, REA's Heath testified that only PSI had made a formal offer (which REA did not present during the hearing), and that this offer may have been conditioned upon settlement of Wabash's

Marble Hill-related litigation against PSI. C/V T. p. 1453-55. Heath also testified that more than a year prior to his testimony, a Kentucky G & T, Big Rivers, expressed interest in Wabash but never submitted a formal offer because it wanted "to see where the [Wabash Valley] bankruptcy was heading before they would formalize their interest." C/V T. p. 1449-50. Heath also confirmed that while IPL had expressed interest in Wabash's transmission access, IPL never made an offer to purchase Wabash. C/V T. P. 1377-79, 1456-57. The Court finds that the reasonable inference is that none of the utilities that had expressed interest in acquiring Wabash was willing to submit a bid that surpassed what Wabash is proposing to pay REA and the other creditors. It is a reasonable conclusion that if REA had received a better offer, REA certainly would have presented that offer for the Court's consideration. REA never did.

a. Under Wabash's Plan, The REA Will Receive More Than Wabash's Fair Market Value As A Going Concern.

39. In determining that the Wabash Plan is fair and equitable to REA and CFC, the Court takes into consideration that under the Wabash Plan, REA and CFC receive a $31.7 million premium beyond the $190 million that Gross optimistically has identified as the fair market value of Wabash as a going concern.

40. The Court concludes that the Wabash Plan confers the greatest possible-economic benefit upon REA and CFC consistent with the purposes of the Bankruptcy Code. Only the Wabash Plan preserves the structure of Wabash and the enforceability of the Supply Contracts, thereby guaranteeing the existence of a future income stream for REA's and CFC's

benefit. While REA's submission of its own plan to take over Wabash explains REA's failure to vote for and support the Wabash Plan, the Court finds that REA's proposals will not maximize its economic return in this proceeding. Regardless of the outcome of REA's attempts to apply its Preemption Rules to Wabash, it is clear, for the reasons set forth by Macneil, that preemption and REA's unilateral imposition of rate increases to recover the Marble Hill loans will breach the Supply Contracts and allow the Members to purchase their requirements elsewhere. Once that happens it will mean the end of Wabash as now constituted, and REA will receive nothing more than its proportionate share of the liquidation value of Wabash's assets (which the Court determined to be $213,210,000.00) rather than its share under the Wabash Plan of payments having a present value in excess of $457 million.[27]

b. Wabash Has Proposed To Pay Its Creditors Upon A Value Of $221.7 Million, Which Represents The Additional Value Of Wabash To Its Members.

41. Wabash presented evidence establishing that its fair market value as a going concern is $190 million. Wabash's Plan provides for the payment for the benefit of its creditors of a $31.7 million premium beyond this going concern value based upon the additional value of $221.7 million that Wabash has to its Members. Olley testified that by identifying and

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[27] Given Heath's testimony regarding REA's other troubled borrowers, the Court wonders whether REA is more concerned with making an example of Wabash (and deterring other REA borrowers) than maximizing REA's economic return in this case.

paying this additional value for the benefit of Wabash's creditors, there is no residual economic benefit for Wabash's Members. C/V T. p. 700-07, 718.

42. Lewellen similarly stated that the incorporation of his valuation analysis in Wabash's Plan means that if the full $221.7 million value is paid to Wabash's creditors, the Members will have given up their entire interest in the enterprise and the Members will have nothing left. C/V T. p. 412-13, 432.

43. Both Lewellen and Olley testified that Lewellen's $221.7 million value defined the upper limit of what the Members rationally can pay for Wabash. At that level, all of the known and projected economic benefits that flow in the future to the Members have been identified and segregated. C/V T. p. 412-13. Olley testified that paying this amount puts the Members at the point of economic indifference, and that this is "the maximum value you could possibly squeeze out . . . of these Wabash members before it would pay them to go find other arrangements were they free to do so." C/V T. p. 18.

44. The Court further finds that Wabash and its Members have expended considerable amounts of their own time, energy and money to maximize REA's financial recovery. Perhaps the best example is the conditional settlements of the Marble Hill-related claims that Wabash has achieved with PSI and S & L. Martin testified generally concerning Wabash's dual efforts from the outset to (a) try to find an economic use for the Marble Hill assets, and (b) hold PSI and S & L accountable for their participation in Marble Hill. Conf. T. I., p. 56, 61-67. Upon final confirmation of the Wabash Plan, creditors will receive 100% of the settlement payments having a present value of at least $185 million. Moreover, Wabash will have

generated at least another $29.8 million from the Marble Hill salvage operations for REA's and the other creditors' benefit. Wabash's Members paid for the expenses of this litigation through the excess margins that were applied to such expenses rather than refunded to the Members as overpayments. *See* May 18, 1990 Entry On Tenth Interim Application For Allowances And Reimbursement Of Expenses by the Attorneys for the Debtor, p. 6-7.

45. Based upon the review of the foregoing facts, the Court finds the Wabash Plan realizes the maximum amount that REA and the other creditors could possibly obtain. The amounts to be paid include the fair market value of Wabash as a going concern that has been determined in a manner that necessarily favors REA, as well as the PSI and S & L Settlements that resulted from difficult and expensive litigation that was prosecuted without cost to REA and the other creditors. Finally, the Wabash Plan pays REA and the other creditors a significant tangible premium that represents the best estimate of the maximum cost savings that the Members have realized or hope to realize in the future from the on-going operation of Wabash.

c. Wabash's Plan Satisfies The Absolute Priority Rule.

46. Section 1129(b)(2)(B)(ii) of the Bankruptcy Code incorporates what traditionally has been referred to as the absolute priority rule. Most often, the practical application of the absolute priority rule has been to prohibit old equity holders from maintaining their interest in an enterprise unless the unsecured creditors first have been paid in full. In this connection, Olley testified that the apparent economic

purpose of the absolute priority rule is to prevent the retention of property by equity holders and ensure that the highest possible amount of money is paid to the creditors. C/V T. p. 720. Wabash presented evidence establishing that there are several bases for the Court to conclude that its Plan satisfies the absolute priority rule.

47. Whatever control the Members may exercise over the operations of the reorganized Wabash is a consequence of the Supply Contracts being assumed by Wabash under Section 9.1 of its Plan and pursuant to 11 U.S.C. § 365.

48. Equity interests usually include two basic attributes: the right to control the entity and the right to a share in the profits generated by the entity. Wabash's Members are in a unique situation because they are entitled to control Wabash not only as "equity holders" (Wabash has no stock and, therefore, no shareholders) but also as parties to the Supply Contracts that expressly give the Members the right to control Wabash and its operations. *See* testimony of Macneil, C/V T. p. 502, 513-21. Thus, even though Wabash's Plan provides that the Members' existing equity interests in Wabash are extinguished, the Members are entitled to post-confirmation control because Wabash must assume the Supply Contracts so that the Members remain obligated to purchase their power requirements from Wabash. Wabash may not assume the executory Supply Contracts under 11 U.S.C. § 365 unless Wabash assumes all the burdens along with the benefits of those agreements. *See, e.g., Matter of Chicago, Rock Island & Pacific R. Co.*, 860 F.2d 267, 272 (7th Cir. 1988); *Sharon Steel Corp. v. National Fuel Gas Distrib.*, 872 F.2d 36, 40 (3d Cir. 1989); *In re Storage Technology Corp.*, 53 B.R. 471,

475-476 (Bankr. D. Colo. 1985). Unless those Supply Contracts remain in force, there will be no future income stream to benefit REA and the other creditors. The value of Wabash is contingent upon assumption of these contracts, which require that the Members continue to control the management of the cooperative enterprise through their election of the Board of Directors.

49. The unique characteristics of Wabash itself buttress the conclusion that Wabash's Plan satisfies the absolute priority rule. As previously discussed, the principal concern underlying the absolute priority rule is to prevent the old equity holders from retaining their interests at the expense of the unsecured creditors who are not repaid fully while the equity holders have the opportunity to profit from the post-confirmation operations of the reorganized debtor. This rationale simply does not apply to a nonprofit, cooperatively owned and managed electric utility incorporated in the State of Indiana. As Olley explained, because Wabash is a not-for-profit organization, the post-confirmation enterprise cannot make a profit for the Members at the expense of the creditors. C/V T. p. 720-21. Indiana law also precludes the Members from profiting upon liquidation of the company since any surplus remaining after dissolution escheats to the State of Indiana. Thus, there is not, nor can there ever be, any profiteering at the creditors' expense. It is precisely this inability to make or receive a profit that distinguishes Wabash from the traditional for-profit debtor. Olley further stated that Wabash's Plan satisfies the economic underpinnings of the absolute priority rule because it converts every piece of economic property in Wabash into cash to be paid to its creditors. C/V T. p. 721-22.

After this $221.7 million has been paid to Wabash's creditors, there is no present or future economic value in Wabash for its Members. C/V T. p. 412-13, 743. Accordingly, the Court finds that under the Wabash Plan, the Members do not receive or retain any property on account of their interests in Wabash and, therefore, Wabash's Plan does not violate the absolute priority rule and satisfies the requirements of 11 U.S.C. § 1129(b)(2)(B)(ii).

d. Even If The Absolute Priority Rule Were To Apply, Wabash's Plan Is Fair And Equitable Because Of The New Capital Being Contributed By The Members.

50. Even if the absolute priority rule did apply, the Court finds that the Wabash Plan is fair and equitable to the unsecured creditors because Wabash's Members have agreed — as a condition to reorganizing Wabash — to contribute substantial new capital, $3.2 million, that is necessary for Wabash's ongoing utility operations. In this connection, the Court finds that the new capital to be contributed is actual money or money's worth that will actually be paid by the Members, that this capital contribution is substantial and necessary for Wabash's post-confirmation operations, and that the capital contribution exceeds the value of any interest that the Members are retaining or receiving under the Wabash Plan.

51. The fresh capital exception began its development more than 60 years ago in the railroad reorganization cases. *See, e.g., Kansas City Terminal Ry. v. Central Union Trust Co.*, 271 U.S. 445 (1926). Justice Douglas articulated the fresh capital exception in *Case v. Los Angeles Lumber Products Co.*, 208 U.S. 106 (1939):

> It is, of course, clear that there are circumstances under which stockholders may participate in a plan of reorganization of an insolvent debtor. This court, as we have seen, indicated as much in Northern P.R. Co. v. Boyd . . . and Kansas City Terminal R. Co. v. Central U. Trust Co. . . . Especially in the latter case did this Court stress the necessity, at times, of seeking new money "essential to the success of the undertaking" from the old shareholders. Where that necessity exists and the old stockholders make a fresh contribution and receive in return a participation reasonably equivalent to their contribution, no objection can be made. But if these conditions are not satisfied the stockholder's participation would run afoul of the ruling of this Court in Kansas City Terminal R. Co. . . . If, however, those conditions we have mentioned are satisfied, the creditor cannot complain that he is not accorded "his full right of priority against the corporate assets." If that were not the test, then the creditor's rights could be easily diluted by inadequate contributions by stockholders.
>
> In view of these considerations we believe that to accord "the creditor his full right of priority against the corporate assets" where the debtor is insolvent, the stockholder's participation must be based on a contribution in money or money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholders.

308 U.S. at 121-22.

Justice Douglas took the occasion in *Case* to articulate the new capital exception, but he found that

the circumstances there did not satisfy that exception because the shareholders were contributing only intangibles, such as their standing in the financial community and ability to provide continuity of corporate management, rather than fresh capital.

52. The Seventh Circuit discussed the new capital exception in *In re Potter Material Service, Inc.*, 781 F.2d 99 (7th Cir. 1986):

> The courts have recognized an exception, however, to this absolute priority rule. An equity interest owner may retain an interest in the debtor corporation so long as the owner invests new capital into the corporation. . . . The new capital investment must (1) represent a substantial contribution and (2) equal or exceed the value of the retained interest in the corporation. . . .

781 F.2d at 101 (citations omitted).

Potter Material Service affirmed orders by this Bankruptcy Judge and the District Court for the Southern District of Indiana that confirmed the debtor's plan on the basis of the new capital exception over the dissent of unsecured creditors who received only 3% of their allowed claims.[28]

(1) The New Capital Exception Remains Viable

53. Upon review of recent authority, this Court finds that the new capital exception not only is viable but is an essential part of modern bankruptcy practice that emphasizes the need to allow debtors to reorgan-

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[28] Under the Wabash Plan, REA and CFC will receive approximately 65% of their pre-petition claims.

ize their affairs and successfully emerge from bankruptcy.

54. In 1978, Congress adopted the Bankruptcy Code that in several respects materially departed from the old Bankruptcy Act. Under the Code, the absolute priority rule itself now applies only where the plan's proponent attempts to confirm the plan over the dissent of an impaired class of creditors. Because the Bankruptcy Code expressly incorporated only the absolute priority rule (in § 1129(b)(2)(B)(ii)) and made no specific mention of the new capital exception, the Supreme Court in *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 203n.3 (1988), raised but expressly declined to decide whether the exception continues. The Seventh Circuit similarly refused to reach a conclusion in *Matter of Stegall*, 856 F.2d 140, 141-142 (7th Cir. 1989), and more recently in *Kham & Nate's Shoes No. 2 v. First Bank of Whiting*, 908 F.2d 1351, 1362-63 (7th Cir. 1990).

55. Based upon the unique circumstances of this case, the Court finds that the new capital exception does survive. This finding is supported by the vast majority of post-*Ahlers* bankruptcy decisions that have upheld the vitality of this exception as an integral part of effective reorganizations. For example, *In re Pullman Construction Industries, Inc.*, 107 B.R. 909 (Bankr. N.D. Ill. 1990), contains a thorough analysis of the viability of the new capital exception. Judge Schmetterer there acknowledged that both the Supreme Court and Seventh Circuit considered it an open issue whether the exception survives, and then presented the following persuasive case (which this Court adopts) for the exception's continuing vitality.

56. The Supreme Court recently reaffirmed the general principle of statutory construction that

"[w]hen Congress codifies a judicially defined concept, it is presumed, absent any express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. ____, 103 L.Ed.2d 891, 903 (1989). The same principles of statutory construction that apply to other statutes also apply to the Bankruptcy Code. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. ___, 103 L.Ed.2d 290 (1989). The Court's ruling in *Midlantic National Bank* v. *New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986) is illustrative. That case presented the issue whether Congress, in enacting § 554(a) of the Bankruptcy Code, codifying the power of a bankruptcy trustee to abandon assets burdensome to the estate, included the judicially developed limitation that such abandonments could not override legitimate state or federal interests. The statute itself made no reference to these judge-made exceptions, providing only: "[A]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate." The Supreme Court held that unless Congress manifests the specific intent to change the judicially developed law, no change will be presumed:

> Before the 1978 revisions to the Bankruptcy Code, the trustee's abandonment power had been limited by a judicially developed doctrine intended to protect legitimate state or federal interests. . . .
>
> . . .
>
> Thus, when Congress enacted § 554, there were well-recognized restrictions on a trustee's

> abandonment power. In codifying the judicially developed rule of abandonment, Congress also presumably included the established corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws. The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule with particular care in constructing the scope of bankruptcy codifications.

474 U.S. at 500-01.

Similarly, in *Kelly* v. *Robinson*, 479 U.S. 37, 50-51 (1986), the Court concluded that in adopting § 523(a)(7) of the Bankruptcy Code, Congress did not disturb the established judicial interpretation that bankruptcy courts could not discharge criminal judgments, specifically those requiring restitution.

57. Precisely the same situation exists with the absolute priority rule and the new capital exception as existed in *Midlantic National Bank* and *Kelly* v. *Robinson*. As Justice White stated in *Ahlers*, the absolute priority rule "developed from judicial construction of the undefined requirements of the early bankruptcy statute that reorganization plans be 'fair and equitable'." 485 U.S. at 202. As previously noted, the Supreme Court developed, and the lower courts applied, the new capital exception prior to the adoption of the Bankruptcy Code in 1978. *Midlantic National Bank* and *Kelly* v. *Robinson* leave little doubt that ordinary principles of statutory construction require that, absent an expression of Congress' specific intent to the contrary, the codification of the

absolute priority rule in § 1129(b) (2) (B) (ii) of the Bankruptcy Code includes the new capital exception. As Judge Schmetterer concluded in *Pullman Construction*:

> There is nothing in § 1129(b)(2)(B)(ii), or its legislative history, that suggests Congress intended to modify seventy-five years of past judicial interpretation of the absolute priority doctrine or its new capital exception. If Congress had so intended, it would have made "that intent specific." . . .
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> . . .
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> Further, to read § 1129(b)(2)(B)(ii) as the U.S. Trustee and Bank suggest would foreclose Chapter 11 as a realistic option for closely held corporations and other small business entities. If, as the Trustee and Bank suggest, the only option available for owners of such businesses to preserve their ownership interest is to pay dissenting unsecured creditors in full under § 1129(b)(2)(B)(ii), then as a practical matter there would be little incentive in most cases for the owners of such businesses to undergo the cost and effort of reorganization instead of liquidating and starting over.
>
> However, the purpose of Chapter 11 is not to liquidate, but rather to rehabilitate, distressed businesses. NLRB v. Bildisco and Bildisco, 465 U.S. 513, 527 . . . (1984) (". . . the policy of Chapter 11 is to permit successful rehabilitation of debtors . . .). Thus, the interpretation of § 1129(b)(2)(B)(ii) urged by the Trustee and the

> Bank would not promote the underlying purpose of Chapter 11 . . . [and] would not "best advance the legislative purpose" of Chapter 11.

107 B.R. at 946-47.[29]

58. Other post-*Ahlers* cases that similarly have concluded that the new capital exception remains a viable part of bankruptcy law include *In re 222 Liberty Associates*, 108 B.R.A 974, 983-84 (Bankr. E.D. Pa. 1990); *In re Greystone III Joint Venture*, 102 B.R. 560, 575 (Bankr. W.D. Tex. 1989); *In re Snyder*, 99 B.R. 885, 888-89 (Bankr. C.D. Ill. 1989); and *In re Henke*, 90 B.R. 451 (Bankr. D. Mont. 1988). These cases establish that the new capital contribution must be money or money's worth that is necessary and substantial and reasonably equivalent in value.

59. Even if the Court were to conclude that the new capital exception does not exist with respect to the typical for-profit, publicly held corporate debtor, the Court believes that such an exception must be available in the unique situation involving a not-for-profit, cooperatively owned and controlled debtor such as Wabash Valley. Indiana law clearly prohibits creditors from becoming members of or acquiring stock in Wabash. *See* I.C. § 23-7-1.1-7. Thus, absent

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[29] *Pullman Construction* properly noted that Justice White's reliance in *Ahlers*, 485 U.S. at 205-206, on Congress' rejection of the Bankruptcy Commission's proposal *to expand* the new capital exception to allow shareholder contributions in forms other than "money or money's worth" is simply not probative of the question whether the then existing fresh capital exception survived adoption of the Bankruptcy Code. 107 B.R. at 947-948. The same conclusion pplies to Judge Easterbrook's reliance in *First Bank of Whiting*, 908 F.2d at 1361-62, upon Congress' failure to adopt this same bankruptcy Commission proposal.

the new capital exception, a not-for-profit debtor that is unable to repay its creditors in full is forced to liquidate. This result is both discriminatory and detrimental to all parties, including creditors who may receive less in a liquidation than a reorganization. Because Wabash should not be deprived of the opportunity to reorganize—particularly where the reorganization will produce a substantially greater economic return for the creditors than liquidation—the Court concludes that the new capital exception is available to Wabash and has been satisfied by its Plan of Reorganization.

(2) The Members' New Capital Contribution Is Money Or Money's Worth.

60. There is no doubt that under Wabash's Plan the $3.2 million in new capital to be contributed in Phase I by Wabash's Members is money or money's worth. This is money that actually will be paid by the Members, not a conditional promise to pay. To remove any doubt in this regard, the Court will require that this amount be paid within 30 days after the order confirming Wabash's Plan becomes final and non-appealable.

(3) The Members' New Capital Contribution Is Necessary And Substantial.

61. Wabash also presented extensive evidence establishing that this new capital is necessary for Wabash's ongoing operations. Wabash's General Manager, Edward P. Martin, testified that the $3.2 million is the amount that is necessary, beyond Wabash's ordinary operating expenses, for extensions and replacements. Conf. T. I., p. 74-75. Martin further testified that the $3.2 million is equal to what the

IURC determined were the short-term capital needs of the company in Wabash's 1983 rate case. *Id.*[30]

62. Olley similarly testified that this $3.2 million new capital infusion will be necessary for Wabash's ongoing operations because all the existing cash and other financial resources will have been stripped out of the company and paid to Wabash's creditors. C/V T. p. 727-28.

63. Wabash also presented evidence establishing that the $3.2 million in new capital to be contributed by its Members is substantial. For example, Lewellen, who is a recognized expert on corporate finance, testified that historically, G & Ts such as Wabash have operated successfully with relatively little capital, and that the Members' new capital contribution will put Wabash in a financial position that compares favorably with other G & Ts. Conf. T. II., p. 24-26. Moreover, as a regulated utility, Wabash also can seek higher rates to cover any unexpected cost increases.

64. Olley testified that substantiality in economic terms is measured based upon the need for capital, and that $3.2 million is substantial when compared to the operations and capital requirement of typical G & Ts. C/V T. p. 728-29.[31]

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[30] While the Court finds that the Phase I $3.2 million contribution is necessary and substantial, the Court notes that under the Wabash Plan, the Members have committed to contributing an additional $5.5 million in new capital if necessary.

[31] It is also noteworthy that REA did not present any evidence that more than $3.2 million in new capital was necessary for the future operations of Wabash as a going concern.

(4) The Members' New Capital Contribution Exceeds Or Is Reasonably Equivalent To The Value Of The Members' Interest.

65. Finally, the evidence presented by Wabash establishes that the $3.2 million contribution of fresh capital that the Members are providing exceeds, or is reasonably equivalent to, the value of any interest that the Members may retain under the Wabash Plan. Olley explained that based upon Lewellen's analysis of the additional value of Wabash to its Members and the payment of this $221.7 million value to Wabash's creditors, there is simply no present or anticipated value left in Wabash. Olley testified that the $221.7 million is "what the members would pay . . . if you squeezed every last dollar out of them." C/V T. p. 700-07, 718. Olley also addressed the fact that, unlike a for-profit corporation, the future right to control Wabash has no economic value. The usual incidents of control that exist in a for-profit corporation — such as the ability to make a profit from operations and pay a dividend as well as the ability to sell assets or liquidate at a profit — do not apply to Wabash's Members. Because the post-confirmation Wabash remains a not-for-profit corporation, there is simply no opportunity for the Members to generate future profits that they can retain at the expense of Wabash's creditors.

66. Olley explained why the Members would want to retain control of Wabash when there is no possibility of future profits and all of the economic benefits have been paid for the benefit of creditors. While, from an economic perspective, the Members may be indifferent about retaining control of Wabash, Olley testified that there are non-economic, qualita-

tive reasons that explain the Members' desire to retain control. C/V T. p. 723-24. These qualitative reasons are the Members' status and history as cooperative associations, including the communication system that they have developed for exchanging information and experiences, the existing conventions to resolve common issues through collective efforts, the ability to pool information and problem-solving techniques in a cooperative environment, and the time, energy and stress that would be required to recreate the qualitative benefits that presently flow to the Members through their association in Wabash. C/V T. p. 723-28.

67. In conclusion, the Court returns to the fact that this case involves a unique entity: a cooperatively owned and managed not-for-profit electric utility that can charge only the rates that have been approved by its customers and the IURC. The Court believes that the Wabash Plan satisfies the absolute priority rule because the Members' future control of the organization derives from the Supply Contracts. Even if the absolute priority rule were to apply, however, the new capital exception remains particularly viable when dealing with Wabash's unique characteristics. The Wabash Plan will generate the greatest economic benefit for the creditors, and leave the Members with nothing of economic value. Based on the foregoing analysis, the Court determines that the Wabash Plan is fair and equitable within the meaning of § 1129(b) of the Code.

68. The Wabash Plan meets the requirements of § 1129 and is confirmable. All objections to the Wabash Plan are denied. The Court will now consider whether the REA Plan is confirmable.

III. THE REA PLAN IS NOT CONFIRMABLE.

A. REQUIREMENTS OF 11 U.S.C. § 1129(a)

1. § 1129(a)(1)

69. Under § 1129(a)(1), the Court may confirm a plan only if it complies with the applicable provisions of Title 11. Numerous objections have been filed to the REA Plan on the grounds that it fails to comply with the provisions of Title 11. The Court concludes that the REA Plan is not confirmable because it violates the provisions of Title 11 described below.

a. REA Plan's Treatment Of Supply Contracts Violates 11 U.S.C. § 365.

70. The REA Plan violates 11 U.S.C. § 365, which governs the assumption of executory contracts such as the Supply Contracts. The Supply Contracts expressly require that all rate requests be approved by the IURC. Dr. Ex. A., 14; Rate Case, 552 N.E.2d at 29; *Wabash v. REA (I)*, 903 F.2d at 453. The Supply Contracts also expressly require that all rate requests be approved by the Wabash Board. Dr. Ex. A, /4. Although the Supply Contracts do not explicitly state that "only the Members may elect the Wabash Board and manage Wabash," the Court agrees with Professor Macneil that such a requirement is implied in the Supply Contracts.

71. The Supply Contracts involve the sale of goods (i.e., electricity); therefore, they are governed by Article 2 of the Uniform Commercial Code. *Helvey v. Wabash County REMC*, 278 N.E.2d 608, 610 (Ind. App. 1972). Under I.C. (26-1-1-201(3), the agreement between Wabash and the Members for the sale of electricity "means the bargain of the parties in fact as

found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in I.C. (26-1-1-205 and I.C. (26-1-2-208." The condition that only the Members may elect the Wabash Board and manage Wabash is implicit both in the language of the Supply Contracts and from the "other circumstances."

72. The Supply Contracts describe Wabash, the seller, as a "Not-For-Profit Corporation" and describe the buyer as "Member." Dr. Ex. A, p. 1. The Supply Contracts also expressly reference the fact that Wabash has or will be entering into identical contracts with all of its present and future Members. *Id.* Paragraph 4 of the Supply Contracts provides that the Members shall pay Wabash for electric power at certain rates, and that the Wabash Board shall review and revise such rates as necessary. *Id.* 14. The language in the Supply Contracts was clearly drafted with reference to the Not-For-Profit Act, under which the Members are authorized to elect Wabash's directors. Additionally, by vesting the power to set rates in a Board of Directors controlled by the Members, Wabash and the Members demonstrated their intent that only the Members may elect Wabash's Board and manage the affairs of Wabash. This condition was so fundamental that it was simply unnecessary to express it.

73. The condition that only the Members may elect the Wabash Board and manage Wabash is also implied from the "other circumstances." Prior to executing the Supply Contracts in 1977, the Members created Wabash and always elected the Wabash Board pursuant to the Not-For-Profit Act and the Wabash By-laws. *See* I.C. § 23-7-1.1-9, Dr. Ex. AA; Dr. Ex. H. This prior conduct between Wabash and the Members

established a "course of dealing" which became an implicit part of the Supply Contracts. *See* I.C. § 26-1-1-205(1) and I.C. § 26-1-1-201(3). In addition, it is indisputable that Wabash is a G & T cooperative, and the uniform practice in the industry is for the distribution cooperatives to elect the boards of directors of the G & T cooperatives. This industry wide practice, or "usage of trade," also became an implicit part of the Supply Contracts because of the "justified expectation that it [would] be observed with respect to the transaction in question." I.C. § 26-1-1-205(2)and I.C. § -1-1-201(3).[32] Finally, the Members have managed Wabash and elected the Wabash Board since executing the Supply Contracts. This "course of performance" under the Supply Contracts reinforces the implication that only the Members may elect the Wabash Board and manage Wabash. *See* I.C. § 26-1-2-208 and I.C. § 26-1-1-201(3).

74. The REA Plan violates 11 U.S.C. § 365 by providing for the partial assumption of the Supply

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[32] Heath acknowledged the industry-wide practice of distribution cooperatives electing the boards of G&Ts during the ollowing cross examination:

Q. It's highly unusual for the Board of a cooperative G&T not to consist of its members, isn't it?

A. Yes, it is. The entire situation here is unique.

Q. And it would normally be the expectation of a . . . distribution cooperative when it entered into a contract with a G&T cooperative, that it would be on the Board and that it would be involved in the rate-making process. In your experience, isn't that correct?

A. I would assume that that was—that that, along with other things, could be the assumption of the members that you're discussing.

Conf. T., III. p. 146.

Contracts without the express provision requiring rate regulation by the IURC and without the implied provision requiring Member control of the Wabash Board. Under 11 U.S.C. § 365, the entire contract must be assumed, including any burdensome provisions. *See e.g., Matter of Chicago, Rock Island And Pacific R. Co.*, 860 F.2d. 267, 272 (7th Cir. 1988) ("A trustee . . . [or debtor in possession] takes the debtor's contracts *cum onere*, that is, subject to existing burdens."); *In re Storage Technology Corp.*, 53 B.R. 471, 475-76 (Bankr. D. Colo. 1985) ("It is black letter law that the Bankruptcy Code requires assumption of an entire agreement.").

b. The REA Plan Provisions Dealing With Payment Of Post-petition Interest Violate 11 U.S.C. §§ 502(b), 506(b), 502(e)(2), 1112(b) And 1123.

75. Because Wabash's going concern value is substantially less than the claims of REA and CFC, REA and CFC are undersecured creditors. Since REA and CFC are undersecured, the REA Plan violates 11 U.S.C. §§ 502(b)(2) and 506(b) by providing that REA and CFC are to be paid post-petition interest. *United Savings Association of Texas v. Timbers Of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988), Dr. Ex. Y.

76. REA previously argued that no valuation is necessary for the confirmation of the REA Plan because the REA Plan only requires payment of post-petition interest "to the extent Wabash is capable." REA Brf. p. 41-42.[33] Not only does this provision

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[33] The citation is to REA's "Brief In Support Of Confirmation of United States' Plan Of Reorganization" filed on or about

offend 11 U.S.C. §§ 506(c) and 1129(b)(2), requiring that claims be estimated and valued as of the effective date of the plan, but it is less than accurate because the REA Plan also provides that Wabash shall be *liquidated* if it is not capable of paying post-petition interest. REA Plan, § 15.6. The penalty of liquidation circumvents, and therefore violates, 11 U.S.C. §§ 502(b)(2) and 506(b).

77. REA also previously argued that, in addition to the "oversecured creditor" and "solvency" exceptions to the rule disallowing claims for post-petition interest, there is a third exception where the "creditor's security produces income after the filing of the bankruptcy petition." REA Brf., p. 42-44. This is merely a corollary to the "oversecured creditor" exception. If a creditor becomes oversecured by virtue of his lien attaching to post-petition income, see 11 U.S.C. § 552(b), he is entitled to post-petition interest to the extent of that equity cushion. However, if the creditor remains undersecured, 11 U.S.C. §§ 502(b)(2) and 506(b) require that the post-petition income be applied to the creditor's pre-petition claim.

78. REA argues that 11 U.S.C. § 502(e)(2) entitles it to post-petition interest notwithstanding whether it is an undersecured creditor. REA Brf., p. 44. As previously discussed in connection with one of REA's objections to the Wabash Plan, REA misconstrues the meaning of 11 U.S.C. § 502(e)(2) and ignores the limitation found in § 502(e)(1)(A). Section 502(e)(2) does not give guarantors such as REA greater rights than the original creditor (i.e., FFB); to the contrary, it provides that the claims of guarantors which

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March 5, 1990. REA has not amended its Plan since the time this brief was filed.

become fixed post-petition shall be treated as pre-petition claims, thus putting the claims of guarantors on an equal footing with the claims of the original creditor. Because FFB's claim for post-petition interest would be disallowed under 11 U.S.C. § 502(b)(2), REA's claim for those same dollars must be disallowed. 3 *Collier On Bankruptcy*, 1502.05[1], p. 502-87 (15th Ed. 1990); *Matter of Baldwin United Corp.*, 55 B.R. 885, 894 (Bankr. S. D. Ohio 1985) (disallowing guarantor's claim because underlying claim was for -post-petition interest).

79. The REA Plan also violates 11 U.S.C. §§ 502(b)(2) and 506(b) because it fails to apply the payments from the Timbers Account to reduce the secured portion of REA's pre-petition claim. *See e.g.*, *In re Club Associates*, 107 B.R. 385 (Bankr. N.D. Ga. 1989); *In re Maun*, 95 B.R. 94 (Bankr. S.D. Ill. 1989). The Court previously directed REA to apply the payments from the Timbers Account to the secured portion of its claim. *See* Findings, 123.

80. Article 22 of the REA Plan violates 11 U.S.C. § 1112(b) by providing that Wabash's bankruptcy petition shall be dismissed if the claims of REA and CFC for post-petition interest are not allowed. The Court's adverse ruling on the issue of whether REA and CFC are entitled to post-petition interest (see discussion above) does not constitute "cause" for dismissal under 11 U.S.C. § 1112(b).

81. Article 22 of the REA Plan, which purports to contain the "exclusive" terms of the REA Plan in the event that a final order is entered disallowing claims for post-petition interest, provides for the dismissal or conversion of the case to Chapter 7, the lifting of the automatic stay so that REA and CFC may take possession of Wabash, and for an injunction against

anyone interfering with REA. Article 22 violates 11 U.S.C. § 1123, which specifies the contents of a plan.

c. The REA Plan Provisions Dealing With The Treatment Of The Members Violate 11 U.S.C. §§ 1122(a), 510(c), 1123(a)(6) And (7).

82. Under 11 U.S.C. § 1122(a), claims may not be classified with interests. Section 2.8 of the REA Plan violates 11 U.S.C. § 1122 by placing the Members' claims for patronage capital and their equity interests into a single class. The only evidence in the record is that the Members' claims for patronage capital constitute a *debt obligation* which is repayable at the discretion of the Wabash Board. Conf. T. I., p. 24. The term "claim" as used in 11 U.S.C. § 101(4) includes contingent claims and is broad enough to encompass the claims filed by the Members. Thus, the Members' claims must be separately classified from their interests.

83. Besides the improper classification of the Members' claims and equity interests, the REA Plan violates several provisions of Title 11 as a result of the manner in which the Members are treated in the REA Plan. Under Section 10.2 of the REA Plan, the Members' allowed claims are not to be paid unless and until all other creditors are paid. However, REA has never established any basis for subordinating the Members' claims under 11 U.S.C. § 510(c).

84. Section 10.1 of the REA Plan violates 11 U.S.C. § 1123(a)(6), (7) by providing that the Members shall retain their equity interests in Wabash without any voting rights. The REA Plan contemplates two classes of equity holders: the preferred stockholders (REA and CFC) and the Members; however, the Mem-

bers are not permitted to exercise any voting rights. Under 11 U.S.C. § 1123(a)(6) and (7), which are to be read together, there must be an appropriate distribution of voting power and the plan must contain provisions "that are consistent with the interests of . . . equity security holders and with public policy with respect to the manner of selection" of officers and directors. *See In re Acequia, Inc.*, 787 F.2d 1352, 1361 (9th Cir. 1986). Sections 1123(a)(6) and(7) require the Court to scrutinize the REA Plan provisions which propose to alter the Members' voting rights. *Id.* In analyzing the REA Plan, the Court is to consider (1) the equity security holders' relative interests in participating in Wabash, (2) the desire to preserve the reorganization, and (3) the overall fairness of the provisions. *Id.* at 1362. Given the Members' unique interest in Wabash and the burdens which they would bear under the REA Plan, the Court concludes that the REA Plan provision stripping the Members of any voting rights is inconsistent "with the interests of equity security holders and with public policy."

d. REA Plan § 23.1 Violates 11 U.S.C. § 1129(a)(1).

85. Section 1129(a)(1) conditions confirmation of any plan on compliance with *all* of the provisions of Title 11. Section 23.1 of the REA Plan attempts to totally circumvent 11 U.S.C. § 1129(a) (1) by providing that Wabash may be liquidated if (i) after confirmation, the REA Plan or a provision thereof is found to be illegal, (ii) the issuance of preferred stock is illegal, or (iii) creditor ownership of preferred stock is illegal. By attempting to nullify § 1129(a)(1), (23.1 of the REA Plan potentially violates *every* provision of Title 11.

2. § 1129(a)(3)

86. Under 11 U.S.C. § 1129(a)(3), a plan must be proposed in good faith and not by any means forbidden by law. Wabash has objected to the REA Plan on the grounds that it was not submitted in good faith. "Good faith," as used in this context, requires that there be a "reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *Matter of Madison Hotel Associates*, 749 F.2d 410 (7th Cir. 1984). *See also Manville* at 649 (good faith requires that plan "bear some relationship to statutory objective of resuscitating a financially troubled corporation"). After reviewing the REA Plan, the Court concludes that there is no reasonable likelihood that the REA Plan will "resuscitate" Wabash from its financial problems. Rather, said Plan is designed to cause the liquidation of Wabash, without explaining how such liquidation would be accomplished, and without the jurisdiction of the Bankruptcy Court. *See* REA Plan, Art. 27. Thus, the Court concludes that the REA Plan violates 11 U.S.C. § 1129(a)(3).

3. § 1129(a)(5)

87. Section 1129(a)(5) requires, inter alia, that the plan proponent disclose the identity of those individuals proposed to serve as directors and officers of the debtor following confirmation, *and* that the appointment of such individuals to such offices be consistent with the interests of creditors, equity security holders and *public policy*. REA failed to identify those individuals who would serve as officers and directors of Wabash following confirmation of the REA Plan. Additionally, REA has not demonstrated that its self-

appointed board of directors would be consistent with the interests of the Members and with public policy.

88. At the January, 1990 hearing, Heath was unable to identify the proposed officers and directors, but he indicated that *REA* had begun the process of identifying those types of individuals which it would appoint as Wabash's officers and directors. Conf. T.III., p. 147-50. Ten months later, at the continued confirmation hearing, Heath was still unable to identify who the officers and directors would be under the REA Plan. C/V T. p. 1365-66. Heath's testimony is revealing for two reasons. First, the REA Plan clearly does not meet the strict identification requirements of 11 U.S.C. § 1129(a)(5); therefore, it may not be confirmed. *See e.g., In re M.S.M. & Associates, Inc.*, 104 B.R. 312, 316 (Bankr. D. Haw. 1989) (denying confirmation of a liquidating plan because, inter alia, the plan failed to identify directors).

89. Second, Heath's testimony indicates that REA, and not the Members, would be selecting Wabash's directors. Under state law, only the Members may elect Wabash's directors. I.C. § 23-7-1.1-9, Dr. Ex. AA. The Members' right to control the Wabash Board is recognized in Wabash's By-laws, Dr. Ex. H, and is required by the Supply Contracts. Apart from their right to elect Wabash's directors, the Members (and their retail customers) obviously have a strong public interest in the composition of the Wabash Board. Any Board of Directors appointed by REA would only be interested in paying as much of the REA debt as possible. Such a Board would be inconsistent with the interests of the Members and in derogation of the public policy concerning regulated utilities.

4. § 1129(a)(6)

90. Because Wabash is a regulated utility, the REA Plan must satisfy 11 U.S.C. § 1129(a)(6). Under 11 U.S.C. § 1129(a)(6), a plan may not be confirmed unless "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned upon such approval." The IURC and the MPSC currently regulate the rates charged by Wabash to the Members. Neither the IURC nor the MPSC has approved the rate increases provided for in the REA Plan; therefore, the REA Plan cannot satisfy 11 U.S.C. § 1129(a)(6) unless the rate increases are "expressly conditioned upon [the] approval" of the regulatory commission which will have jurisdiction over the rates of Wabash after confirmation of the REA Plan.

91. In an attempt to comply with 11 U.S.C. § 1129(a)(6), the REA Plan provides that the specified rate increases "shall be conditioned upon approval by any governmental regulatory body with jurisdiction, after confirmation, over Wabash's rates." REA Plan, § 17.1. Standing alone, such a provision might satisfy the literal requirements of § 1129(a)(6); however, the REA Plan contains additional provisions which completely subvert § 1129(a)(6).

92. Because the Rate Case and *Wabash v. REA (I)* preclude the rate increases required by the REA Plan, the REA Plan attempts to "adjust" to those adverse decisions by providing that (1) the appeals therefrom shall continue after the Effective Date,

REA Plan, § 17.2,[34] and (2) if the specified rate increases have not been implemented by December 31, 1991, the preferred stockholders may liquidate Wabash.[35] REA Plan, § 23.4. Thus, the REA Plan simultaneously provides for unlawful rate increases *and the liquidation of Wabash if those currently unlawful rate increases are not approved.* Such provisions nullify § 1129(a)(6), which requires that the plan proponent abide by the final decision of the regulatory commission. Although *confirmation* of a plan may be conditioned upon obtaining approval of the specified rate increases, REA cannot condition the liquidation of Wabash upon whether the requested rate increases are approved.

93. As stated by the *Collier* treatise,

> [t]he Code does not permit chapter 11 to be used as a device for circumventing the regulatory powers of any commission created under federal or state law which has jurisdiction over rates charged by the debtor. If a plan proposes to modify such rates, the debtor must obtain the requisite approval of the regulatory authority or the proposed rate change must be specifically conditioned upon approval of such regulatory authority.

5 *Collier On Bankruptcy* § 1129.02[6], p. 1129-35 (15th ed. 1990). The REA Plan provision allowing REA to liquidate Wabash if the proposed rate increases are

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[34] The decisions in the Rate Case and in *Wabash v. REA (I)* are now final and non-appealable; therefore, § 17.2 of the REA Plan is meaningless.

[35] The Court notes that it would be virtually impossible for the rate increases specified in the REA Plan to be implemented by December 31, 1991.

not approved would circumvent the regulatory powers of any commission having jurisdiction over Wabash's rates, in violation of (1129(a)(6).

5. § 1129(a) (7)

94. Under 11 U.S.C. § 1129(a)(7), a plan may not be confirmed unless each holder of an impaired claim or interest has accepted the plan or will receive property having a value that is not less than the value that the holder of such claim or interest would receive in a Chapter 7 liquidation. With the exception of REA, not a single impaired creditor or Member accepted the REA Plan. Therefore, REA had the burden of proving that each creditor and Member will receive an amount under the REA Plan equal to or greater than the amount which such entity would receive in a Chapter 7 liquidation. Although there is evidence in the record establishing Wabash's liquidation value at approximately $213,210,000.00, there is no evidence in the record establishing that PSI and the Members will receive more under the REA Plan than they would receive in a Chapter 7 liquidation.

95. Under the REA Plan, PSI is to receive $466,017.00 over five years, without interest and without security. Thus, to satisfy § 1129(a)(7) with respect to PSI, REA had the burden of proving that PSI would not receive more than the present value of $466,017.00 in a Chapter 7 liquidation. Similarly, because the Members are to receive nothing under the REA Plan, REA had the burden of proving that the Members would receive nothing in a Chapter 7 liquidation. REA failed to offer any evidence to meet its burden of proof.

96. PSI filed claims against Wabash in the liquidated amount of $29 million and in the contingent

amount of $110 million. Such claims are waived as part of the PSI Settlement which is incorporated into the Wabash Plan, but they have not been otherwise estimated or disallowed. Because PSI rejected the REA Plan, and the PSI Settlement would not exist in a Chapter 7 liquidation, for purposes of this analysis PSI's claims are entitled to prima facie validity. *See* 11 U.S.C. § 502(a); Bankr. R. 3001(f).

97. Similarly, the Members' claims for patronage capital in the amount of $7,184,740.07 have never been subordinated or disallowed. Although the REA Plan purports to subordinate the Members' claims to the claims of other creditors, the only evidence in the record is that the Members' claims represent a valid debt obligation. Conf. T. I., p. 24.

98. REA may contend that the allowed amount of PSI's claims and the Members' claims is irrelevant because there would be no unencumbered funds in a Chapter 7 liquidation to make any distribution to unsecured creditors such as PSI and the Members. However, REA had the burden of proof on this issue and failed to offer *any* evidence establishing that PSI and the Members would receive nothing in a Chapter 7 liquidation.

99. There are at least two possibilities in which unencumbered funds may exist to make a substantial distribution to PSI and/or the Members in a Chapter 7 liquidation of Wabash. First, the funds previously in the Timbers Account and paid to REA (as well as the excess margins accumulated by Wabash since the Timbers Account was closed) may be unencumbered because, under Indiana law, such funds represent excess margins which accrue for the benefit of the Members. I.C. § 8-1-2-42(d); Dr. Ex. P. While the Court ordered that these funds be paid to REA (see

Findings, 23), it did so in anticipation of a plan being confirmed. In the context of a Chapter 7 liquidation, the provisions of I.C. § 8-1-2-42(d) would have to be revisited.

100. Second, it is questionable whether the REA Mortgage encumbers any proceeds from the tort litigation against PSI and S & L. Such a security interest clearly is not perfected under Article 9 of the Uniform Commercial Code. *See* I.C. § 26-1-9-104(k), Dr. Ex. Q; *In re Ore Cargo, Inc.*, 544 F.2d 80 (2d Cir. 1976). The REA Mortgage also fails to qualify as a common law assignment of the tort litigation because (1) the tort litigation did not exist and was not contemplated by the parties at the time the REA Mortgage was executed, (2) the REA Mortgage merely purports to create a lien and does not represent a present transfer of title to any assets, and (3) there was no intent to vest in REA a present right to the tort litigation. *See In re Ore Cargo, Inc.*, 544 F.2d at 82; 3 *I.L.E. Assignments* § 21, p. 173; *Brown v. Indiana Nat. Bank*, 476 N.E.2d 888, 894 (Ind. App. 1985).

101. The Wabash Plan waives these two legal issues in favor of REA and CFC, thereby creating additional dollars for REA and CFC. However, the issues have not been waived for purposes of the REA Plan. If either the excess margins or the proceeds from the tort litigation with PSI and S & L are unencumbered, PSI and/or the Members may receive more in a Chapter 7 liquidation than they are to receive under the REA Plan. Under any circumstances, REA has totally failed in its burden of proof on this issue.

6. § 1129(a) (8)

102. Since PSI (Class 3) and the Members (Class 8) did not accept the REA Plan, the REA Plan does not satisfy 11 U.S.C. § 1129(a)(8). If the REA Plan satisfied all of the provisions of 11 U.S.C. § 1129(a), with the exception of § 1129(a)(8), the Court could only confirm the REA Plan if it satisfied the cram-down requirements of § 1129(b). However, the REA Plan does not satisfy the requirements of either § 1129(a) or § 1129(b).

7. § 1129(a)(11)

103. Numerous objections have been filed to the REA Plan under 11 U.S.C. § 1129(a)(11). For the reasons discussed below, the Court concludes that the REA Plan is not feasible.

a. The REA Plan Does Not Qualify As A Liquidating Plan.

104. To satisfy § 1129(a)(11), concerning the feasibility of a plan, the plain proponent must prove that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor . . . unless such liquidation or reorganization is proposed in the plan." Although the REA Plan is replete with circumstances which may "cause" the liquidation of Wabash, the REA Plan does not actually explain or "propose" how liquidation would occur. During his cross examination concerning the details of Wabash's liquidation, Heath's only response was that the procedure for liquidating Wabash would be at the discretion of the Wabash Board. Conf. T. III., p. 126.

105. Because the REA Plan does not contain any provisions for the orderly liquidation of Wabash, and

fails to retain this Court's jurisdiction over any such liquidation, REA Plan, Art. 27, the REA Plan fails to qualify as a "liquidating plan." *See generally* 11 U.S.C. § 1123(a)(5); *In re Cherry*, 84 B.R. 134 (Bankr. N.D. Ill. 1988) (plan not feasible because it failed to explicitly provide for liquidation and failed to provide for the court's continuing jurisdiction to supervise the liquidation). Thus, the feasibility of the REA Plan must be evaluated as a plan of reorganization.

106. When determining the feasibility of a plan of reorganization, the Court should "consider [1] the adequacy of the capital structure, [2] the earning power of the business, [3] the economic conditions, [4] the ability of management, [5] the continuity of the present management, and [6] other matters which determine the prospects of a sufficiently successful business operation." *In re Cherry* at 138. A plan is not feasible unless it offers a "reasonable prospect of success." *Id.*; *Manville*, 68 B.R. at 635. The purpose of section § 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation." 5 *Collier On Bankruptcy* 1129.02[11], p. 1129-53 (15th Ed. 1990).

b. The REA Plan Would Breach The Supply Contracts.

107. To the extent that the REA Plan seeks to modify the Supply Contracts to the prejudice of the Members, the enforceability of the Supply Contracts, and thus the feasibility of the REA Plan, are obviously called into doubt. As discussed above, the Supply Contracts require Member control of the Wabash Board and IURC jurisdiction over Wabash's

rates. The REA Plan seeks to take control of the Wabash Board away from the Members. By attempting to enforce the Preemption Rules against Wabash, REA seeks to take jurisdiction over Wabash's rates away from the IURC and MPSC. Either of these unilateral modifications would breach the Supply Contracts, allowing the Members to purchase power elsewhere. Without the Supply Contracts intact, the REA Plan is clearly not feasible.[36]

108. REA argues that Judge McKinney determined the Supply Contracts to be "legally binding" and that such determination is the "law of the case" REA Brf., p. 27-29. First, Judge McKinney did not determine that the Supply Contracts are "legally binding." To the contrary, Judge McKinney stated that the bankruptcy court "properly decided that it was *not* to make binding legal decisions on whether the power contracts are enforceable." Valuation Case, 111 B.R. at 767-68. Second, the "law of the case" doctrine does not apply where, as here, Judge McKinney expressly indicated that the parties are "free to present new or additional evidence to the bankruptcy court on remand on . . . *all* . . . issues." *Id.* at 776 n.11. In any event, as mentioned previously, Judge McKinney was not reviewing the enforceability of the Supply Contracts within the present context of the REA Plan which seeks to materially modify those contracts, thereby giving rise to valid defenses against any attempt to enforce such contracts.

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[36] REA's Heath admitted that preemption is an essential aspect of the REA Plan, and that if preemption breached the Supply ontracts, he did not know whether he still believes that the REA Plan is feasible. C/V T. p. 1436-37.

c. The REA Plan Is Unlawful.

109. The REA Plan is also not feasible because many of its provisions, including its payment schedule, are unlawful. On March 21, 1990, the Indiana Supreme Court affirmed the Rate Case and unequivocally rejected all of REA's arguments that it is entitled to a rate increase to recover the Marble Hill debt. In unambiguous terms, the Indiana Supreme Court held that:

> Marble Hill provided no energy to Wabash's ratepayers; therefore, *any* charge purportedly imposed for service would have been inappropriate here. Likewise, Marble Hill never became "used or useful" in the production of energy; therefore, *none* of the operation expenses associated with the project were properly chargeable to the Wabash ratepayers.

Rate Case, 552 N.E.2d at 27-28 (emphasis added). The REA Plan is not feasible because it provides for the recovery of all of the Marble Hill debt, in violation of state law.

110. The REA Plan is also not feasible because it conflicts with several Indiana statutes and with one section-of the REA Act. Although the REA Plan appears to maintain Wabash in its current not-for-profit form, it violates several provisions of the Not-For-Profit Act. Under I.C. § 23-7-1.1-7, Dr. Ex. X, an Indiana not-for-profit corporation may not issue stock. The REA Plan is not feasible because it proposes to issue preferred stock to creditors. Recognizing this defect, the REA Plan goes on to provide that, if the issuance of stock is illegal, the secured creditors shall be entitled to modify their mortgage

and grant themselves the same rights given to shareholders. This is placing form over substance. In further recognition of this defect, REA states in its Brief that if the issuance of stock is illegal "the debtor may restructure itself as a for-profit corporation which can issue stock." REA Brf., p. 56. The short answer to this argument is that the REA Plan does not contain such a provision.

111. Indiana law also provides that a not-for-profit corporation may be dissolved only upon "the vote of a majority of the *members* entitled to vote thereon." I.C. § 23-7-1.1-33(b)(2), Dr. Ex. Z (emphasis added). The Not-For-Profit Act further provides that only the *members* of a not-for-profit corporation may elect the corporation's Board of Directors. I.C. § 23-7-1.1-9, Dr. Ex. AA. In spite of these provisions, the REA Plan proposes to give *creditors* the right to liquidate Wabash and the right to elect Wabash's Board of Directors. ~~If~~ REA is to operate Wabash as a not-for-profit corporation, it must comply with the Not-For-Profit Act.

112. REA argues that its Plan may contravene the Not-For-Profit Act pursuant to either I.C. § 23-1-38-8 or 11 U.S.C. § 1123(a)(5). REA Brf., p. 54-56. Indiana Code § 23-1-38-8, authorizing the amendment of a corporation's articles of incorporation without any action by the board of directors or shareholders if necessary to carry out a plan of reorganization, does not apply to not-for-profit corporations, and there is not a similar provision in the Not-For-Profit Act. In addition, I.C. § 23-1-38-8 merely authorizes a streamlined procedure for amending a corporation's articles; it does not authorize amendments which contravene state statutes.

113. REA relies on *In re Public Service Co. of New Hampshire*, 108 B.R. 854 (Bankr. D. N.H. 1989) for the proposition that 11 U.S.C. § 1123(a)(5) overrides state restrictions on the issuance of stock, election of directors and the liquidation of a corporation. REA Brf., p. 54-55. In *In re Public Service Co. of New Hampshire*, the Court issued a narrow declaratory judgment that 11 U.S.C. § 1123(a)(5) preempts *state regulatory statutes authorizing the public utility commission to approve certain corporate transactions* if: (1) the transactions are "necessary and required to effectuate the 'restructuring' of the debtor" and (2) the transactions are specifically covered by 11 U.S.C. § 1123(a)(5). 108 B.R. at 892. A reading of the case reveals that the Court was primarily concerned with the effective veto power which the public utility commission would have over the debtor's plan. *See e.g.*, *id.* at 887, 891. There was no question that the corporate transactions contemplated in the debtor's plan were otherwise permissible under the applicable state laws concerning utility corporations.

114. In the case of the REA Plan, REA proposes to "reorganize" Wabash as a hybrid between a not-for-profit corporation and a not-for-profit corporation. The Wabash proposed by REA would have both shareholders and members, with only the shareholders having the right to elect Wabash's Board and determine whether Wabash should be liquidated. Unlike the *In re Public Service Co. of New Hampshire* case, there is no state agency threatening to veto the REA Plan; rather, the REA Plan provisions simply fail to comply with the Not-For-Profit Act. Thus, the REA Plan, as drafted, is not feasible.

115. Under Indiana regulatory law (which is the applicable law as a result of the *Wabash v. REA (I)*), Wabash's excess margins must be credited against the increased fuel costs charges to the Members. I.C. § 8-1-2-42(d); Dr. Ex. P. The REA Plan is not feasible because it provides that the excess margins shall be deposited into the Note Creditors' Reserve Fund for the benefit of creditors, in violation of state law. The treatment of Wabash's excess margins is clearly tantamount to rate regulation, which is one area which Congress has *expressly* left to the appropriate regulatory commissions. 11 U.S.C. § 1129(a)(6).

116. The REA Plan also violates a provision of the REA Act, 7 U.S.C. § 907, which provides that the REA may operate its collateral "for such period as may be deemed necessary . . . but not to exceed five years after the acquisition thereof."[37] The REA Plan is not feasible because it calls for REA ownership and operation of Wabash for the next 37 years, in violation of a federal statute. Since REA must divest itself of Wabash within the five years, it is incumbent on REA to describe in its Plan how such a transfer would occur.

117. The REA Plan is also not feasible because REA wrongly assumes that the wholesale rate increases specified therein will be automatically passed through by the IURC and MPSC at the retail level. *See* REA Brf., p. 51-52, *citing*, *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986). The *Nantahala* case involved wholesale rates set by the FERC, a *federal regulatory commission*, and there is no reason to believe that the "filed rate

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[37] *See Public Service Co. of Indiana* v. *Hamil*, 416 F.2d 648 (7th Cir. 1969), *cert. denied*, 396 U.S. 1010 (1970).

doctrine" espoused therein would apply to a *federal lending agency* such as REA.

d. The Payment Schedule In The REA Plan Cannot Possibly Be Met.

118. Focusing strictly on its pecuniary interest, REA states that "[t]he critical feasibility issue about the U.S. Plan is whether its payment schedule can be met." REA Brf., p. 16. As mentioned above, the payment schedule calls for REA and CFC to be paid the present value of more than $1 billion by 2027. The REA Plan assumes that REA and CFC will receive cash in the approximate amount of $228 million (including $185 million from PSI and S & L) and that Wabash may implement the rate increases specified in REA scenario 2 in order to generate additional revenues having a present value of more than $750 million.

119. The Court has found that Wabash's maximum value is $221.7 million; therefore, the REA payment schedule is absurd. By REA's own test, since the payment schedule contained in the REA Plan cannot possibly be met, the REA Plan is not feasible. Section 15.1b of the REA Plan, which contains the estimated payment schedule, indicates that the first payment to creditors will be approximately $49 million. REA's Exhibit 31, which projects Wabash's revenues under the REA Plan, indicates that only approximately $28 million will be available to make the first payment under the REA Plan. In the event that revenues are insufficient to meet the payment schedule under the REA Plan, Section 15.3 of the REA Plan requires that the shortage be paid from the Note Creditors' Reserve Fund. The Note Creditors' Reserve Fund consists of all "remaining funds" as of the Effective Date plus future excess margins. The

REA Plan is not feasible because, by REA's own calculations, there will be a $21 million shortfall in revenues during the first year of operations under the REA Plan, and no funds will exist in the Note Creditors' Reserve Fund to pay the shortage. Thus, Wabash will be in default in the first year under the REA Plan and REA could exercise its right under the notes to accelerate the indebtedness. REA Plan, Exs. A, B, C.

120. REA's own appraiser, Jerominski, rejected REA scenario 2 (C/V T. p. 1510), which is the same rate increase scenario that REA contends is necessary to meet the payment schedule in the REA Plan. C/V T. p. 1429-34. Thus, the REA payment schedule is clearly not feasible.

121. The REA payment schedule is also not feasible because of REA's incorrect assumption that it may unilaterally realize the benefits of the PSI Settlement and the S & L Settlement. REA may not unilaterally realize the benefits of the Settlements because they are expressly contingent upon approval of Wabash's Plan (or a consensual resolution of the bankruptcy case), REA is not a party to said agreements, and PSI rejected the REA Plan. Without the PSI Settlement and S & L Settlement, the REA Plan is not feasible because it has overestimated the proceeds available to pay creditors by $185 million. The feasibility of the REA Plan is further undermined by the prospect that PSI may be entitled to assert a claim for as much as $110 million under the REA Plan.

122. Lastly, the credibility and feasibility of the REA payment schedule were completely refuted by the testimony at the January, 1990, confirmation hearing that REA had never even considered the

adverse tax consequences which would result from the REA Plan. Randall Snowling, an expert in the field of taxation of G & Ts, testified unequivocally that Wabash would be taxable under the REA Plan. Conf. T. III., p. 177-82. The basis for Snowling's opinion was that the reorganized Wabash under the REA Plan would no longer possess the necessary characteristics of a tax-exempt cooperative under Section 501(c)(12) of the Internal Revenue Code. As illustrative cases supporting his opinion, Snowling cited *Puget Sound Plywood, Inc. v. Commission*, 44 T.C. 305 (1965) and *Etter Grain Company, Inc. v. United States*, 72-1 U.S.T.C. ¶ 9465 (5th Cir. 1972).

123. REA offered no evidence to refute Snowling's opinion. The best that REA could do was to argue in its Brief that, either the Internal Revenue Service ("IRS") would find Wabash to be tax-exempt if the result would be more total dollars for the collective government or, absent a favorable ruling from the IRS, Wabash could "seek a special legislative exemption." REA Brf., p. 47-48. The Court rejects these arguments because they are based on pure speculation of counsel, with no support to be found in either the record or the Internal Revenue Code. The Court concludes, therefore, that Wabash would lose its tax-exempt status under the REA Plan.

124. As demonstrated by Snowling's testimony, the loss of Wabash's tax exempt status raises serious questions regarding the feasibility of the REA Plan. Using the payment schedule found in the REA Plan, Snowling testified that the REA Plan would result in a total tax liability of $437,637,716.00. Conf. T. III., p. 193; Dr. Ex. T. Using the alternative payment schedule found in REA's Exhibit 31, the total tax liability increases to $497,115,160.00. Conf. T. III., p. 196; Dr.

Ex. U. It should be noted that the payment schedules used by Snowling *assume* that REA receives $170 million from the PSI Settlement. If less than $170 million is realized from PSI, the payment schedule would have to be adjusted upward, resulting in still higher tax liability.

125. The Court rejects REA's argument that the tax consequences of the REA Plan are "negligible" because the present value of such tax liability is "only" $30 million. REA Brf., p. 47. The future tax liability will be almost one-half billion dollars, not $30 million as REA implies. The evidence in the record does not support a finding that Wabash can pay one billion dollars to its creditors, let alone generate an additional $400 million to $500 million in revenues as a result of being taxable. In any event, the REA Plan does not even recognize or attempt to deal with the tax liability; therefore, the REA Plan is seriously deficient on its face.[38]

B. REQUIREMENTS OF 11 U.S.C. § 1129(b)

1. § 1129(b)(1)

126. Even if the REA Plan satisfied all the requirements of 11 U.S.C. § 1129(a) (except for subsection 8 thereof), it could still not be confirmed because it fails to satisfy the "cram down" provisions of 11 U.S.C. § 1129(b). Under § 1129(b)(1), a plan may not "discriminate unfairly" and must be "fair and equitable" with respect to each class of impaired claims or interests which has not accepted the plan. Although REA concedes that the Members and PSI

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[38] As indicated by Professor Macneil, the increased tax burden resulting from the REA Plan would also result in a breach of the Supply Contracts by Wabash. C/V T. p. 542.

are impaired, and both classes rejected the REA Plan, there is no evidence in the record to show that the requirements of 11 U.S.C. § 1129(b) have been satisfied.

127. Under the REA Plan, the unsecured claims of PSI and the Members are separately classified from the unsecured claims of REA and CFC, and are given less favorable treatment. Even assuming, arguendo, that there is some justification for discriminating against the Members' claims, there has been no showing that PSI's claims are not entitled to the same treatment being given to the unsecured claims of REA and CFC. Thus, REA has not met its burden of proof under § 1129(b)(1). If PSI had accepted the REA Plan such treatment would be permissible, but PSI rejected the REA Plan.

128. The REA Plan does not satisfy the requirements of 11 U.S.C. § 1129, and is not confirmable.

IV. ENTRY OF ORDERS

129. Because the Wabash Plan is confirmable and the REA Plan is not, the Wabash Plan shall be confirmed. The PSI Settlement and S & L Settlement are reasonable and should be approved as part of the Wabash Plan. An appropriate order shall be entered confirming the Wabash Plan, subject only to Wabash obtaining the approvals of the IURC and MPSC for any rate increase required by the Wabash Plan. A separate order shall be entered denying confirms of the REA Plan.

130. Any legal conclusions contained within the Findings of Fact shall stand as additional Conclusions of Law.

WHEREFORE, the Court will enter separate Orders confirming the Wabash Plan and denying confirmation of the REA Plan in accord with the rulings herein.

DATED this 7th day of August, 1991, at Indianapolis, Indiana.

/s/ RICHARD W. VANDIVIER
RICHARD W. VANDIVIER,
UNITED STATES BANKRUPTCY JUDGE

DISTRIBUTION: [Omitted]

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 94-3086, 94-3087, 94-3088, 94-3095

IN THE MATTER OF WABASH VALLEY POWER ASSOCIATION, INCORPORATED, DEBTOR-APPELLEE

APPEAL FROM THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION
91 C 928, 91 C 929,
91 C 930, 91 C 1301

APPEAL OF: UNITED STATES OF AMERICA, ON BEHALF OF THE RURAL ELECTRIFICATION ADMINISTRATION

[APR. 2, 1996]

Before: Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
LARRY J. MCKINNEY, Judge.

ORDER

This case is before the court on a petition for rehearing and suggestion for rehearing *en banc* filed by the Appellants. No judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is, DENIED.

In addition, this court's opinion of December 28, 1995, is hereby amended by inserting, between "*e.g.*," and "*Vermont*" in line 1 of note 7 on page 23, the following: "*Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345, 1360-61 (N.D. Ga. 1986), *aff'd*, 844 F.2d 1538 (11th Cir. 1988);".

IT IS SO ORDERED.

APPENDIX E

STATUTORY ADDENDUM

11 U.S.C. § 1124. Impairment of claims or interests

Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—

(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest;

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—

(A) cures any such default that occurred before or after a commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title;

(B) reinstates the maturity of such claim or interest as such maturity existed before such default;

(C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law; and

(D) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest; or

(3) provides that, on the effective date of the plan, the holder of such claim or interest receives, on account of such claim or interest, cash equal to—

(A) with respect to a claim, the allowed amount of such claim; or

(B) with respect to an interest, if applicable, the greater of—

(i) any fixed liquidation preference to which the terms of such security representing such interest entitle the holder of such interest; or

(ii) any fixed price at which the debtor, under the terms of such security, may redeem such security from such holder.

11 U.S.C. § 1126. Acceptance of plan

(a) The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan. If the United States is a creditor or equity security holder, the Secretary of the Treasury may accept or reject the plan on behalf of the United States.

(b) For the purposes of subsections (c) and (d) of this section, a holder of a claim or interest that has accepted or rejected the plan before the commencement of the case under this title is deemed to have accepted or rejected such plan, as the case may be, if—

(1) the solicitation of such acceptance or rejection was in compliance with any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation; or

(2) if there is not any such law, rule, or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information, as defined in section 1125(a) of this title.

(c) A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(d) A class of interests has accepted a plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(e) On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title.

(f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class

from the holders of claims or interests of such class is not required.

(g) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests.

11 U.S.C. § 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring properties under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable;[1]

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting

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[1] So in original. The semicolon probably should be a period.

trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507(a)(1) or 507(a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(3), 507(a)(4), 507(a)(5) or 507(a)(6) of this title, each holder of a claim of such class will receive—

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan

equal to the allowed amount of such claim; and

(C) with respect to a claim of a kind specified in section 507(a)(7) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930,[2] as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this

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[2] So in original. Probably should be section 1930 of title 28.

title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(b) (1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

(C) With respect to a class of interests—

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933 (15 U.S.C. 77e). In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

APPENDIX F

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CASE NO. IP85-2238 RA V

IN RE: WABASH VALLEY POWER ASSOCIATION, INC.,
DEBTOR

WABASH VALLEY POWER ASSOCIATION, INC.'S
THIRD RESTATED FOURTH AMENDED PLAN OF
REORGANIZATION

WABASH VALLEY POWER ASSOCIATION, INC., the Debtor herein, hereby proposes the following plan of reorganization, as modified on August 4, 1989, October 5, 1989, November 29, 1989, December 6, 1989, and August 23, 1990, pursuant to Chapter 11 of the United States Bankruptcy Code.

ARTICLE I

Definitions

The following terms, when used in the Plan, shall, unless the context otherwise requires, have the following meanings:

1.1 Allowed Claim or Interest

Any Claim against or Interest in the Debtor, (i) the proof of which was filed on or before the Bar Date or; (ii) which was scheduled by the Debtor as liquidated in amount and not disputed or contingent; *and* (iii) in either case, a Claim or

Interest to which the Debtor does not object or that is allowed by a Final Order of the Court.

1.2 Allowed Secured Claim

Any Allowed Claim to the extent it is secured by (i) a lien on the Debtor's assets, or (ii) a right of set-off under 11 U.S.C.§ 553.

1.3 Allowed Unsecured Claim

Any Allowed Claim to the extent it is not secured either by a lien on the Debtor's assets or a right of set-off under 11 U.S.C.§ 553.

1.4 Bar Date

January 31, 1987, the date designated by the Bankruptcy Court in its order dated October 8, 1986 as the last day for filing a proof of Claim or Interest.

1.5 Chapter 11

Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §101, *et seq.*

1.6 CFC

National Rural Utilities Cooperative Finance Corporation.

1.7 Claim

As used herein, this term shall have the meaning stated in 11 U.S.C. §101(4).

1.8 Confirmation Order

The order of the Bankruptcy Court confirming the Plan pursuant to 11 U.S.C. §1129 of the Bankruptcy Code.

1.9 Court

United States Bankruptcy Court for the Southern District of Indiana, Indianapolis Division ("Bankruptcy Court"), where appropriate pursuant to 28 U.S.C. §151. Otherwise, the United States District Court for the Southern District of Indiana, Indianapolis Division ("District Court").

1.10 Date of Confirmation

The date upon which a Confirmation Order is entered confirming the Plan pursuant to 11 U.S.C. §1129.

1.11 Debtor

Wabash Valley Power Association, Inc., a not for profit corporation formed on December 12, 1963, pursuant to the laws of the State of Indiana.

1.12 Effective Date of the Plan

A date five (5) days after the Confirmation Order is entered by the Bankruptcy Court.

1.13 FFB

Federal Financing Bank, an instrumentality of the United States established under 12 U.S.C. §2281, *et seq.*

1.14 Final Order

An order, judgment, or decree of the Court as to which (i) the time for appeal has expired and no appeal has been timely taken; or (ii) any appeal that had been timely taken has been finally determined or dismissed.

1.15 Generation and Transmission Assets

All assets of the Debtor following confirmation which are retained by the Debtor and used in its ongoing operation including the Operating Funds. The Generation and Transmission Assets as an operating entity have a value equal to the Going Concern Value.

1.16 Going Concern Value

The sum of $190,000,000.00 which represents the fair market value of the Debtor as a continuing entity based upon a willing buyer-willing seller valuation.

1.17 Intrinsic or Internal Value

The sum of $221,700,000.00 which represents the intrinsic or internal value of the Debtor as a continuing entity operating under its current structure on behalf of its members.

1.18 Investment Accounts

Cash and cash equivalents of the Debtor, not including the Marble Hill Salvage Account, Marble Hill Contractor Escrow Account, or Operating Funds. The Investment Accounts consist of short-term cash investments made by the Debtor in the ordinary course of its business. The Investment Accounts as of June 30, 1990 here approximately $19,000,000.00.

1.19 Marble Hill

A partially completed nuclear generating plant located principally in Jefferson County, Indiana construction of said facility was the responsibility of PSI and was terminated in 1984 prior to

its completion. Debtor owns a 17% investment in said plant.

1.20 Marble Hill Assets

The Marble Hill Assets consist of the PSI Litigation, Marble Hill Salvage Account, Marble Hill Contractor Escrow Account, and the Debtor's interest in the salvage value of the remaining property associated with Marble Hill, including the Marble Hill To Columbus Line. The estimated value of such assets is $207,843,729.36.

1.21 Marble Hill Contractor Escrow Account

The escrow account maintained by the Debtor with MNB for the purpose of segregating the settlement proceeds from the Marble Hill Contractor Litigation and the proceeds recovered from Management Analysis Company ("MAC") in the PSI Litigation (i.e $500,000.00). As of June 30, 1990, the balance in this account was $3,122,072.44, and the estimated future deposits were $242,386.34 Thus, the account is valued at approximately $3,364,458.78.

1.22 Marble Hill Contractor Litigation

The litigation brought by PSI and the Debtor against (1) Commonwealth Electric Company, Inc. and Paul C. Schorr, III (collectively referred to as "Commonwealth"), (2) L.K. Comstock and Company, Inc., Comstock Group, Inc., and Charles L. Scharfe, Jr. (collectively referred to as "Comstock") and (3) Lord Electric company, Inc. and Peter F. Matthews (collectively referred to as "Lord Electric") in the District Court, Cause Nos. IP85-86-C and IP85-

336-C, and the litigation brought by PSI against Westinghouse Corporation in the District Court. The Marble Hill Contractor Litigation, which arose out of Marble Hill, has been settled.

1.23 Marble Hill To Columbus Line

A partially completed 765KV transmission line.

1.24 Marble Hill Salvage Account

The account maintained by the Debtor for the purpose of segregating its 17% share of the Marble Hill liquidation proceeds. The balance in the Marble Hill Salvage Account as of June 30, 1990 was approximately $16,379,270.58.

1.25 Members

The following 24 rural electric membership corporations which purchase wholesale electricity from the Debtor: Boone County REMC, Carroll County REMC, Fulton County REMC, Hancock County REMC, Hendricks County REMC, Jasper County REMC, Jay County REMC, Kankakee Valley REMC, Kosciusko County REMC, LaGrange County REMC, Marshall County REMC, Miami-Cass County REMC, Newton County REMC, Noble County REMC, Northeastern REMC (formerly, Whitley County REMC), Parke County REMC, Steuben County REMC, Tipmont REMC, United REMC, Wabash County REMC, Warren County REMC, White County REMC, Paulding-Putnam Electric Cooperative, Inc., and Fruit Belt Electric Cooperative.

1.26 Members' Committee

The Official Members' Committee appointed by the Bankruptcy Court herein, the members thereof and any successor members.

1.27 MNB

Merchants National Bank & Trust Company of Indianapolis, Trustee.

1.28 Operating Funds

Cash and cash equivalents reserved by the Debtor for working capital and accrued payables. Based on current circumstances, the requisite Operating Funds are estimated to be approximately $7,100,000.00. Operating Funds are included as part of the Generation and Transmission Assets.

1.29 Petition Date

May 23, 1985, the date on which the Debtor filed its Chapter 11 petition.

1.30 Plan

This plan of reorganization and any duly filed amendments and modifications thereto.

1.31 Pro-rata Interest[s]

The percentage interests of REA and CFC resulting from their joint lien on the Debtor's assets. The actual Pro-rata Interests of REA and CFC shall be determined as of the Date of Confirmation based upon the amount of each creditor's Claim. The Pro-rata Interests for the purposes of the Plan are estimated based upon the amounts due to said creditors on the Petition Date. The total REA Claim as of the

Petition Date was approximately $670,979,429.14, and the total CFC Claim as of the Petition Date was approximately $27,995,623.92. Using such amounts, the Pro-rata Interest of REA is estimated to be 95.995% ($670,979,429.14 divided by [$670,979,429.14 + $27,995,623.92] = 95.995%) and the Pro-rata Interest of CFC is estimated to be 4.005% ($27,995,623.92 divided by [$27,995,623.92 + $670,979,429.14] - 4.005%). The Court shall retain jurisdiction to adjudicate said percentages in the event of a dispute.

1.32 PSI

PSI Energy, Inc., formerly known as Public Service Company of Indiana, Inc.

1.33 PSI Litigation

The litigation brought by the Debtor against PSI, S & L, MAC, and other defendants in the District Court, Cause No. IP84-252C, and which is pending against PSI and S & L.

1.34 PSI Settlement

The proposed agreement between the Debtor and PSI to settle that portion of the PSI Litigation brought against PSI. The present value of the PSI Settlement is $170,000,000.00.

1.35 REA

Rural Electrification Administration, an agency of the United States established under 7 U.S.C. §901, *et seq.*

(Because REA's Claims arose out of its liability as guarantor of FFB loans, references to PEA include FFB.)

1.36 REA Adversary Proceeding

The adversary proceeding initiated by REA against the Debtor and the Members, designated as 87-495.

1.37 S & L

Sargent & Lundy, Engineers, one of the defendants in the PSI Litigation.

1.38 S & L Settlement

The proposed agreement between the Debtor, S & L and PSI to settle that portion of the PSI litigation brought against S & L. The present value of the S & ID Settlement is $15,000,000.00.

1.39 Timbers Account

The escrow account previously maintained at MNB pursuant to a Stipulation between the Debtor and REA, which was approved by the Bankruptcy Court on August 25, 1988. Pursuant to the order and judgment of this Court dated July 19, 1990, the sum of $28,928,693.22 was paid by the Debtor to the REA with said sum to be credited to the principal amount of non-Marble Hill debt owed by the Debtor to REA as a pre-payment on the REA's secured claim allowed pursuant to this Plan.

ARTICLE II

Classification of Claims

PRIORITY CLAIMS[1]

2.1 Class 1 Administrative Claims

Class 1 consists of the Claims for administrative expenses having priority under 11 U.S.C. §§507(a)(1) and 503(b), including all valid expenses of administration incurred by the Debtor in the operation of its business during this proceeding.

SECURED CLAIMS

2.2 Class 2 Secured Claim of REA - Generation and Transmission Assets

Class 2 consists of the Allowed Secured Claim of REA which shall be secured by a new first mortgage on the Generation and Transmission Assets. The allowed amount of said claim is estimated at $182,390,500.00 which represents REA's Pro-rata Interest in the Generation and Transmission Assets as determined by the Going Concern Value.

2.3 Class 3 Secured Claim of CFC - Generation and Transmission Assets

Class 3 consists of the Allowed Secured Claim of CFC which shall be secured by a new first mortgage on the Generation and Transmission Assets. The allowed amount of said claim is estimated at $7,609,500.00 which represents

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[1] There are no priority Claims under 11 U.S.C. §507(a)(2) through (7).

CFC's Pro-rata Interest in the Generation and Transmission Assets as determined by the Going Concern Value.

2.4 Class 4 Secured Claims of REA and CFC - Investment Accounts and REA Adversary Proceeding

Class 4 consists of the Allowed Secured Claims of REA and CFC to the extent of their Pro-rata Interests in the Investment Accounts and any recovery from the REA Adversary Proceeding. Based on their Pro-rata Interests, the Class 4 Allowed Secured Claim of REA is estimated to be $18,239,050.00, and the Class 4 Allowed Secured Claim of CFC is estimated to be $760,950.00.

2.5 _____ This Section is blank.

2.6 Class 6 Secured Claims of REA and CFC - Marble Hill Assets

2.6a Class 6 consists of the Allowed Secured Claims of REA and CFC to the extent of their Pro-rata Interests in the Marble Hill Assets. The value of the Marble Hill Assets is estimated to be approximately $207,843,729.36 broken down as follows:

(1) PSI Litigation - $185,000,000.00 (consisting of present value of the PSI Settlement in the amount of $170,000, 000.00 and the present value of the recovery against S & L in the amount of $15,000,000.00);

(2) Marble Hill Salvage Account - $16,379,270.58;

(3) Marble Hill Contractor Escrow Account - $3,364,458.78; and

(4) Debtor's interest in the salvage value of remaining Marble Hill property - $3,100,000.00.

2.6b Based on their Pro-rata Interests, the Class 6 Allowed Secured Claim of REA is estimated to be $199,519.588.00 and the Class 6 Allowed Secured Claim of CFC is estimated to be $8,324,141.36.

2.7 Class 7 CFC Set-Off Claim

Class 7 consists of the Allowed Secured Claim of CFC to the extent of its right of set-off against the Debtor, as provided by 11 U.S.C. §§553, 506(a). The Class 7 Allowed Secured Claim of CFC is estimated to be approximately $8,162,899.04.

UNSECURED CLAIMS

2.8 Class 8 Unsecured Claims Less Than $25,000.00

2.8a Class 8 consists of the Allowed Unsecured Claims less than $25,000.00.

2.8b The Class 8 creditors, with their Allowed Unsecured Claims indicated in parenthesis, include Johnson Controls ($20,000.00), Graham Electronics ($130.86), Tab Products Co. ($261.16), IBM ($165.80), Mechanical Products ($210.00), Ken Kleen ($150.00), Data Communications ($808.40), and Records Management ($62.25).

2.9 Class 9 Claims of PSI

2.9a PSI has filed the following amended Claims:

(1) general unsecured Claim in the amount of $29,586,678.00 (plus an unspecified, contingent amount not to exceed $110,000,000.00);

(2) administrative Claim in the sum of $27,487,527.00 (plus an unspecified, contingent amount not to exceed $110,000,000.00) to the extent that the above general unsecured Claim can be characterized as a valid administrative Claim; and

(3) secured Claim (based on set-off) to the extent that the above general unsecured Claim gives rise to a valid right of set-off.

2.9b Included in the above Claims is a Claim for tax liability indemnification in the amount of $466,017.00 arising out of an Indemnification Agreement executed by the Debtor on August 27, 1982 in connection with its acquisition of an interest in the Gibson Unit No. 5 generating station ("Indemnification Claim"). With the exception of the Indemnification Claim, all of PSI's Claims are related to Marble Hill.

2.9c On November 16, 1988, the Debtor filed objections to PSI's Claims (excluding the Indemnification Claim) for the reason that such Claims related to Marble Hill and would be disposed of in the PSI Litigation. The PSI Settlement provides that the Indemnification Claim shall be paid and that PSI's Marble Hill Claims shall be paid nothing. Hence, the Debtor esti-

mates that PSI's Class 9 Allowed Unsecured Claim is $466,017.00.

2.10 Class 10 Unsecured Claims of REA, CFC and Other Creditors Not Separately Classified

2.10a Class 10 consists of the Allowed Unsecured Claims of REA and CFC. Based on the estimated payments to be made to REA under Classes 2, 4, and 6, the class 10 Allowed Unsecured Claim of REA is estimated to be $271,000,000.00. Based on the estimated payments to be made to CFC under Classes 3, 4, 6 and 7, the Class 10 Allowed Unsecured Claim of CFC is estimated to be $12,000,000.00.

2.10b The remaining Class 10 creditors include Lord Electric, Comstock, and Commonwealth, defendants in the Marble Hill Contractor Litigation. Said Claims are estimated to be zero because they do not specify any amount owing, and settlements have been approved by the Bankruptcy Court which provide for payments to the Debtor. See sections 1.21 and 1.22 of the Plan.

2.11 Class 11 Claims of Members

Class 11 consists of the Allowed Unsecured Claims of the Members as of the Petition Date. The amount of these Claims is $7,184,740.07.

INTERESTS

2.12 Class 12 Interests of Members

Class 12 consists of the Interests of the Members in the Debtor.

ARTICLE III

Provisions for Satisfying Claims

PRIORITY CLAIMS

3.1 Class 1 Administrative Claims

The Administrative Claims shall be paid in cash and in full on the Effective Date or when allowed by Final Order of the Court, whichever is earlier; provided, however, that administrative expenses incurred in the ordinary course of the Debtor's business shall continue to be paid as they become due, and provided further that the Debtor and a class 1 creditor may agree to delay payment. Administrative Claims allowable under 11 U.S.C. §§503(b)(2) and 330(a) which may be unpaid on the Effective Date are estimated to be approximately $1,000,000.00. The source of payment of such Claims shall be the Contributed Capital or the Debtor's revenue.

SECURED CLAIMS

3.2 Class 2 Secured Claim of REA - Generation and Transmission Assets

The Class 2 Allowed Secured Claim of REA, estimated to be $182,390,500.00, shall be satisfied as follows:

3.2a On the Effective Date, a new promissory note shall be issued to REA in the face amount

of $153,461,806.78 which represents its Class 2 Claim less $28,928,693.22 paid to REA from the Timbers Account pursuant to the Court's order and judgment dated July 19, 1990. The note shall provide for 140 quarterly principal and interest payments with interest computed from time to time at the lower of:

(1) Base Rate (that interest rate charged by MNB and posted from time to time as "Merchants Base Rate");

(2) The interest rate established by FFB on the basis of the determination by the United States Secretary of the Treasury pursuant to Section 6(B) of the Federal Financing Bank Act of 1973 (12 U.S.C. §2285(b)); or

(3) Such other rate as is determined by the Court to be appropriate.

3.2b The note may be prepaid at any time at the option of the Debtor without penalty. Said note shall be secured by a new first mortgage on the Generation and Transmission Assets *pari passu* with the mortgage of CFC on the Generation and Transmission Assets. In the event the Debtor and REA are unable to agree upon a form of promissory note or mortgage by the Effective Date, any disputes as to the terms of said documents shall be submitted to the Court for determination. Resolution of said disputes shall delay neither confirmation nor the Debtor's obligation to make quarterly

principal and interest payments. The source of payment shall be the Debtor's revenue.

3.3 Class 3 Secured Claim of CFC - Generation and Transmission Assets

The Class 3 Allowed Secured Claim of CFC, estimated to be $7,609,500.00, shall be satisfied as follows:

Said Claim shall continue to be evidenced by the Princeton, Indiana Pollution Control Revenue Bonds (Series 1982Z) and the City of Indianapolis Economic Development Revenue Bonds (Series 1980A) (collectively, the "Bonds"), as modified by the provisions of the Plan. Interest shall accrue on said Claim at the rates as provided in the Bonds. Payments shall be made to CFC in equal, quarterly installments with the final payment due on December 31, 2012. The Claim shall be secured by a new first mortgage on the Generation and Transmission Assets *pari passu* with the mortgage of REA on the Generation and Transmission Assets. In the event the Debtor and CFC are unable to agree upon a form of mortgage by the Effective Date, any disputes as to the terms of said document shall be submitted to the Court for determination. Resolution of said disputes shall delay neither confirmation nor the Debtor's obligation to make quarterly principal and interest payments. The source of payment shall be the Debtor's revenue.

3.4 Class 4 Secured Claims of REA and CFC - Investment Accounts and REA Adversary Proceeding

3.4a The Plan recognizes the joint lien of REA and CFC on the Investment Accounts.[2] Based on their Pro-rata Interests, the Class 4 Allowed Secured Claim of REA is estimated to be $18,239,050.00 and the Class 4 Allowed Secured Claim of CFC is estimated to be $760,950.00. On the Effective Date, REA and CFC shall be paid in cash a sum equal to the balance which is in the Investment Accounts on the Effective Date, according to their Pro-rata Interests.

3.4b In the REA Adversary Proceeding, REA asserts a lien on cash that was allegedly transferred to the Members after the Petition Date. The Debtor and Members dispute such allegations. The REA Adversary Proceeding shall continue, and REA and CFC shall receive their Pro-rata Interest in any sum which is determined by a Final Order to be owing to such creditors. The expected recovery is estimated by the Debtor to be zero. Any recovery from

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[2] There is a legal issue as to whether REA and CFC have a lien on the Investment Accounts. In Cause No. IP87-1097-C, the District Court entered an interlocutory order affirming the Bankruptcy Court's conclusion that REA and CFC have a perfected lien and remanding the matter for an additional hearing on adequate protection. The Debtor appealed to the Seventh Circuit Court of Appeals, Cause No. 89-1457. There is a further issue as to whether the Members have a superior interest in the Investment Accounts. On the Effective Date, the Debtor and the Members shall be deemed to have waived such issue in favor of REA and CFC.

the REA Adversary Proceeding shall reduce the deficiency Claims of REA and CFC.

3.5 _____ This Section is blank.

3.6 Class 6 Secured Claims of REA and CFC - Marble Hill Assets

3.6a The Plan recognizes the joint lien of REA and CFC on the Marble Hill Assets. The Marble Hill Assets consist of the PSI Litigation, Marble Hill Salvage Account, Marble Hill Contractor Escrow Account, and the Debtor's interest in the salvage value of any remaining property associated with Marble Hill. The estimated value of said assets is $207,343,729.36. Based on their Pro-rata Interests in the Marble Hill Assets, the Class 6 Allowed Secured Claim of REA is estimated to be $199,519,588.00 and the Class 6 Allowed Secured Claim of CFC is estimated to be $8,324,141.36.

3.6b The Class 6 Allowed Secured Claims shall be satisfied as follows:

(1) Once the Confirmation Order becomes a Final Order (or on such other date as the PSI Settlement becomes effective pursuant to paragraph 24 thereof) PSI shall pay REA and CFC the sum of $80,000,000.00 according to their Pro-rata Interests;

(2) Once the Confirmation Order becomes a Final Order (or on such other date as the PSI Settlement becomes effective pursuant to paragraph 24 thereof) PSI shall undertake the obligation to pay REA and CFC, according to their Pro-rata Inter-

ests, the principal sum of $90,000,000.00, plus simple interest on the unpaid principal at a rate to be negotiated between PSI, REA and CFC. If the parties are unable to agree on the interest rate, the Bankruptcy Court shall determine the appropriate interest rate. Such obligation shall be payable annually over thirty-five (35) years, in accordance with the provisions of the PSI Settlement;

(3) Thirty (30) days after the Confirmation Order becomes a Final Order (or on such other date as provided in paragraphs 3, 5, and 13 of the S & L Settlement agreement), S & L shall pay REA and CFC the sum of $15,000,000.00 according to their Pro-rata Interests, plus interest as provided in paragraph 5 of the S & L Settlement agreement.

(4) On the Effective Date, REA and CFC shall be paid the cash in the Marble Hill Salvage Account according to their Pro-rata Interests. Any proceeds from the Marble Hill salvage program which are received by the Debtor subsequent to the Effective Date shall be promptly paid to REA and CFC according to their Pro-rata Interests.

(5) On the Effective Date, REA and CFC shall be paid the cash in the Marble Hall Contractor Escrow Account according to their Pro-rata Interests. Any payments received by the Debtor from the Marble Hill Contractor Litigation subsequent to the

Effective Date shall be promptly paid to REA and CFC according to their Pro-rata Interests.

3.6c Any remaining deficiency Claims of CFC and REA shall be treated as Class 10 Unsecured Claims.

3.7 Class 7 CFC Set-off Claim

3.7a As of the Petition Date, CFC had an unsecured Claim against the Debtor in the approximate amount of $8,719,458.41. In its proof of claim, CFC asserts a secured set-off claim to the extent allowed under 11 U.S.C. §553. The basis for this right of set-off is certain capital term certificates, subordinated capital term certificates, debt service reserve certificates and patronage capital certificates (collectively, the "certificates") in the total amount of approximately $8,162,899.04.

3.7b CFC shall be allowed a Class 7 Allowed Secured Claim, based on set-off, in the amount of the Certificates. On the Effective Date, the Certificates shall be set-off against CFC's Claim. The remaining deficiency Claim, estimated to be $556,559.37, shall be treated as a Class 10 °Allowed Unsecured Claim.

UNSECURED CLAIMS

3.8 Class 8 Unsecured Claims Less Than $25,000.00

The Class 8 Allowed Unsecured Claims shall be paid in full on the Effective Date.

3.9 Class 9 Claims of PSI

3.9a PSI has filed three (3) Claims which, collectively, assert a liquidated liability in the amount of $29,586,678.00, and a contingent liability in an amount not to exceed $110,000,000.00. Included in PSI's Claims is the Indemnification Claim in the amount of $466,017.00. Other than the Indemnification Claim, all of PSI's Claims are related to Marble Hill.

3.9b Pursuant to the PSI Settlement, the Class 9 Claims of PSI shall be treated as follows:

(1) The Indemnification Claim shall be allowed in the full amount of $466,017.00, and shall be paid over five (5) years without interest. On the Effective Date, the Debtor shall issue an unsecured note to PSI in the face amount of $466,017.00. Said note shall be payable in five (5) equal annual installments, with the first installment being due twelve (12) months after the Effective Date. The note may be pre-paid at the option of the Debtor without penalty. The source of payment shall be the Debtor's revenue or the Contributed Capital;

(2) All other Claims of PSI shall be paid nothing under the Plan.

3.10 Class 10 Unsecured Claims of REA, CFC and other Creditors Not Separately Classified

3.10a The Class 10 Allowed Unsecured Claims consist of the following:

(1) Unsecured Claim of REA. The Debtor has objected to the allowance of this claim. Said Claim is estimated to be $271,000,000.00 if it is allowed in full;

(2) Unsecured Claim of CFC. Said Claim is estimated to be $12,000,000.00;

(3) Claim of Lord Electric (estimated to be zero);

(4) Claim of Comstock (estimated to be zero); and

(5) Claim of Commonwealth (estimated to be zero).

3.10b The Class 10 creditors allowed claims shall be paid on a pro-rata basis an amount equal to the sum of $31,840,000.00 which represents the difference between the Intrinsic or Internal Value and the Going Concern Value plus the value of the Debtor's unsecured assets. Said creditors shall also be entitled to receive:

(1) Any amount from the Investment Accounts which is determined by a Final Order to be free and clear of liens (estimated value is zero because the Plan recognizes the joint lien of REA and CFC); and

(2) Any proceeds from the PSI Litigation which are determined by a Final Order to be free and clear of liens (estimated value is

zero because the Plan recognizes the joint lien of REA and CFC.

3.10c Based on the estimated Claims, the expected dividend distribution to REA is $30,489,984.00, and the expected dividend distribution to CFC is $1,350,016.00. If the REA claim is disallowed, the CFC claim would be paid in full.

3.10d REA's allowed claim shall be paid in 140 quarterly principal and interest payments with interest computed as provided in §3.2a.

3.10e CFC's allowed claim shall be paid in equal quarterly installments with the final payment due on December 31, 2012 with interest to accrue at the rates specified in the Bonds.

3.11 Class 11 Claims of Members

3.11a The Members have filed Claims against the Debtor in the total amount of $7,184,740.07. The Claims of the Members shall be allowed in the full amount claimed. The Members' Claims are separately classified because of the Members' unique interest in the continuing operation of the Debtor.

3.11b If the Class 10 creditors are not paid in full, the Class 11 Allowed Unsecured Claims shall be reduced by the percentage of Class 10 Allowed Unsecured Claims which are not paid under the Plan. The remaining Class 11 Allowed Unsecured Claims shall remain on the Debtor's books and shall be paid, if at all, only in accordance with the Debtor's By-Laws.

INTERESTS

3.12 Class 12 Interests of Members

The Plan recognizes the interests of the Members even though they may not be equity security holders because they do not possess the usual indicia associated with an equity security holder. The Members shall not receive or retain any property under the Plan on account of their interests, and upon the Date of Confirmation, the interest of each existing Member of the Debtor shall terminate.

ARTICLE IV

Impairment of Classes and Eligibility to Vote

4.1 Classes 2, 3, 4, 6, 9, 10, 11 and 12 are impaired as defined in 11 U.S.C. §1124. Classes 1, 7 and 8 are not impaired. Under 11 U.S.C. §1126, all of the Classes are eligible to vote on the Plan except for Classes 1, 7 and 8 which are deemed to have accepted the Plan.

ARTICLE V

11 U.S.C. §1111(b)(2) Election

5.1 Prior to approval of the Disclosure Statement, either REA or CFC, or both, may elect treatment under 11 U.S.C. §1111(b)(2).

ARTICLE VI

Provisions For Classes of Creditors Which Are Impaired and Do Not Accept the Plan

6.1 In the event any class of creditors which is impaired does not accept the Plan as provided in 11 U.S.C. §1129(a)(8)(A), the Debtor requests the Court to confirm the Plan pursuant to 11 U.S.C. §1129(b).

ARTICLE VII

Approval of Rates by State Utility Regulatory Commissions

7.1 The payments provided for in the Plan will probably require a rate increase to be charged by the Debtor to its Members. The Debtor is currently subject to regulation by the Indiana Utility Regulatory Commission ("IURC") and the Michigan Public Service Commission ("MPSC). After confirmation of, the Plan, the IURC and MPSC shall continue to have jurisdiction over the rates charged by the Debtor. As provided in 11 U.S.C. §1129(a)(6), any rate change necessitated by the Plan is subject to the approval of the IURC and the MPSC. The Debtor reserves the right to seek such rate change prior to the hearing on confirmation of the Plan or to ask the Court to recess the confirmation hearing pending action by the IURC and MPSC.

7.2 The rate increase which the Debtor will seek pursuant to 11 U.S.C. §1129(a)(6) is estimated to be 4.2%. The increase required will depend upon various factors, including timing of the filing, projections of future operating expenses and other elements normally involved in a utility rate case. The Debtor is currently collecting more revenues than its current expenses. Under Indiana regulatory law, the excess revenues reduce the amount that the Debtor may charge for future sales to its customers. After confirmation, the Debtor does not anticipate excess revenues since they will be needed to pay obligations under the Plan. Including the use of the excess revenues, the Debtor's obligations under the Plan

will require an increase in revenue collections of approximately 13.8%.

ARTICLE VIII

Provisions to be Included in Debtor's Charter

8.1 Following the Date of Confirmation, the Debtor shall take such action as is necessary to include in its Articles of Incorporation provisions to satisfy the requirements of 11 U.S.C. §1123(a)(6).

ARTICLE IX

Means for Execution of the Plan

9.1 The ability of the Debtor to make the payments provided for in this Plan is dependent upon the continued obligation of the Members to purchase their electric power requirements from the Debtor. Without this source of income, the Debtor would have no continuing business operations and the creditors would realize only the liquidation value of the Debtor's assets.

Upon the Date of Confirmation the Debtor will be deemed to have assumed the power supply contracts with its twenty-four Members which will insure the Debtor of a continuing market and source of income. The power supply contracts entitle the Members collectively to select the Board of Directors.

Upon the Date of Confirmation, each Member whose power supply contract with the Debtor is assumed shall be fully obligated by all of the terms and conditions of said contract and shall also have all rights granted to said Member, both explicit and implicit, including the right to select a member of the Board of Directors.

9.2 In order to provide necessary working capital and to assure feasibility of the Plan, the Members shall:

> On a collective basis contribute $3,213,346.00 and $5,500,000.00 (the "Contributed Capital") to be paid by the Members through rates to be approved by the Indiana Utility Regulatory Commission ("IURC") and the Michigan Public Service Commission ("MPSC"). The new Contributed Capital through rates shall be made in two phases. Phase I in the amount of $3,213,346.00 is a customer charge of $11,157.45 per month for twelve (12) months to each Member. Subject to the orders of the IURC and the MPSC, the Phase I Contributed Capital shall begin immediately after the Effective Date of the Plan. Phase II is a subdocket procedure to raise amounts required up to $5,500,000.00 as a per-capita (1/24th each) fixed customer charge as needed by the Debtor. Phase II is to be implemented at any time during the ten (10) year period following the Effective Date upon the adoption of a resolution of the Board of Directors of the Debtor and the approval of the IURC and the MPSC. Contributed capital may be used for any legitimate corporate purpose.

9.3 Notwithstanding Section 9.2 above, each Member shall have the right to make a cash contribution to the Debtor to satisfy its Phase I and/or Phase II Contributed Capital obligations on a per-capita (1/24th each) basis.

9.4 Notwithstanding Section 9.2 above, if the Court determines that deferred payments by the Members are inadequate to allow confirmation of the Plan, the

Phase I contributed Capital shall be paid in cash by the Members promptly after the Effective Date.

9.5 Upon the Date of Confirmation, the Members shall be deemed to have waived any Claim to the cash in the Investment Accounts and to reimbursement of costs of the PSI Litigation. The Debtor was required to expend the sum of approximately $18,000,000.00 to pursue the PSI Litigation. Said sum was paid by the Members through higher rates even though all of the benefits of the litigation, totalling $185,000,000.00, inure to the creditors who refused to participate in the costs of said litigation.

9.6 On the Effective Date, the Debtor shall assume all executory contracts which the Debtor has not previously rejected or moved to reject.

9.7 On the Effective Date, the Debtor shall issue promissory notes and security instruments in accordance with the terms of the Plan.

9.8 On the Effective Date, the Debtor shall pay the Class 8 creditors.

9.9 Following the Effective Date, the Debtor shall amend the Articles and By-laws as necessary to comply with the provisions of the Plan.

ARTICLE X

Directors and Officers

10.1 Following the Date of Confirmation, the Debtor's Board of Directors shall continue to be elected by the Members. It is anticipated that the current Board of Directors shall continue to serve as

such following the Date of Confirmation. The names of the current Directors are as follows:

DIRECTOR	REMC
Earl Hoock	Boone County REMC
William Mullin	Carroll County REMC
Emil Knoska	Fruit Belt REMC
Roy Schipper	Fulton County REMC
John Cash	Hendricks County REMC
Lee Hanna	Hancock County REMC
Lynn Jordan	Jasper County REMC
Calvin Loy	Jay County REMC
John Bowmar	Kankakee Valley REMC
Fred Powell	Kosciusko County REMC
Warren F. Parish	LaGrange County REMC
Donald H. Kaufman	Marshall County REMC
Ralph Finster	Miami-Cass County REMC
Kenneth Gordon	Newton County REMC
Harold Huelsenbeck	Noble County REMC
	Northeastern REMC
Phil Carrington	Park County, REMC
Edwin G. Beucler	Paulding-Putnam REMC
Gordon Sams	Steuben County REMC
	Tipmont REMC
Robert W. Brickley	United REMC
Robert H. Hippensteel	Wabash County REMC
Joe Clem	Warren County REMC
Melvin Coonrod	White County REMC

10.2 It is anticipated that the Debtor's Officers shall continue to serve as such following the Date of Confirmation. The names and offices of such individuals currently serving are:

(1) Joe R. Clem, President
(2) Gordon Sams, First Vice President
(3) Lee Hanna, Second Vice President
(4) Phil Carrington, Secretary-Treasurer

10.3 The continuance of the Directors and Officers of the Debtor is consistent with the interests of the creditors, Members and public policy.

ARTICLE XI

Reservation of Rights and Property

11.1 Following the Date of Confirmation, the Debtor shall retain all causes of action it may have under state or federal law including the United States Bankruptcy Code, and the Debtor shall be authorized to prosecute such actions as fully and completely as if the same were being prosecuted by a Trustee in Bankruptcy.

11.2 Following the Date of Confirmation, the Debtor shall retain the right to dispute any Claims and file objections thereto.

11.3 Upon entry of the Confirmation Order, all of the property of the estate shall be vested in the Debtor, free and clear of all Claims and interests of creditors except as provided for in the Plan, and the Debtor shall be entitled to manage its affairs without further order of the court. See 11 U.S.C. §1141(b).

ARTICLE XII

Modification of Plan

12.1 The Debtor may propose amendments or modifications of this Plan as provided in 11 U.S.C. §1127.

ARTICLE XIII

Jurisdiction of the Court

13.1 The Court will retain jurisdiction for various purposes including, but not limited to, the following:

(1) For classification of the Claims of any creditor and for the re-examination of any Claims which have been allowed for purposes of voting, and the determination of such objections as may be filed to creditors' Claims. The failure by the Debtor to object to or to examine any Claim for the purpose of voting shall not be deemed to be a waiver of the right to object to, or re-examine the Claim in whole or in part;

(2) For determination of all questions and disputes regarding title to the assets of the estate, determination of all causes of action, controversies, disputes, or conflicts, whether or not subject to action pending as of the Date of Confirmation between the Debtor and any other party, including but not limited to, any rights of the Debtor to recover assets pursuant to the provisions of the Bankruptcy Code;

(3) For the correction of any defect, the curing of any omission, or the reconciliation of any inconsistency in this Plan or the Confirmation Order as may be necessary to carry out the purposes and intent of this Plan;

(4) To consider any matters brought before the Court by an interested party necessary to

carry out the terms, conditions and intent of this Plan;

(5) For the modification of this Plan after confirmation pursuant to the Bankruptcy Rules and the Bankruptcy Code;

(6) To enforce and interpret the terms and conditions of this Plan;

(7) To enter any order, including injunctions, necessary to enforce the title, rights and powers of the Debtor and to impose such limitations, restrictions, terms and conditions of such title, rights, and powers as this Court may deem necessary;

(8) To determine whether a default has occurred under the Plan, and make such orders as the Court deems necessary to enforce the provisions of the Plan;

(9) To adjudicate the Adversary Proceeding brought by the Debtor against REA pursuant to 11 U.S.C. Section 525, Adversary Proceeding No. 89-43 and the REA Adversary Proceeding; and

(10) To enter an order concluding and terminating this case.

13.2 Notwithstanding any other provisions hereof, the jurisdiction of this Court shall terminate six (6) months after the Confirmation Order becomes a Final Order; provided, however, that the time limit on the jurisdiction of the Court stated herein may be

extended by Court order pursuant to a request to the Court from the Debtor.

ARTICLE XIV

Miscellaneous Provisions

14.1 All payments to CFC hereunder shall be made directly to CFC as guarantor.

14.2 All fees payable by the Debtor pursuant to 28 U.S.C. §1930 have been paid or shall be paid as of the Effective Date.

14.3 Pursuant to 11 U.S.C. §§1114 and 1129(a)(13), all retiree benefits shall continue, unmodified, after the Effective Date.

14.4 Entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of the PSI Settlement. Notwithstanding the Bankruptcy Court's approval of the PSI Settlement, the PSI Settlement shall not become effective until the date on which the confirmation order becomes a Final Order, or on such other date as the PSI Settlement becomes effective pursuant to paragraph 24 thereof.

14.5 Entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of the S & L Settlement. Notwithstanding the Bankruptcy Court's approval of the S & L Settlement, the S & L Settlement shall not become effective until the date on which the Confirmation Order becomes a Final Order, or on such other date as the S & L Settlement becomes effective pursuant to paragraph 13 thereof.

14.6 The Members' Committee shall continue to exist for as long as this Court retains jurisdiction over this matter pursuant to Article XIII hereof.

ARTICLE XV

Discharge of Debtor

15.1 Upon entry of the Confirmation Order, the Debtor shall be discharged of all its debts and obligations except as provided for in this Plan.

DATED: August 23, 1990.

WABASH VALLEY POWER
ASSOCIATION, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

IN THE MATTER OF WABASH VALLEY POWER ASSOCIATION, INC.

THE UNITED STATES OF AMERICA, ON BEHALF OF THE RURAL ELECTRIFICATION ADMINISTRATION,

Petitioner,

WABASH VALLEY POWER ASSOCIATION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT WABASH VALLEY POWER ASSOCIATION, INC.

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THE QUESTION ACTUALLY PRESENTED

The Rural Electrification Administration ("REA") presents only one question for this Court's consideration: Whether the Court of Appeals created an exception to the "absolute priority rule" of 11 U.S.C. § 1129(b)(2)(B)(ii) for a not-for-profit cooperative whose members continue to elect its directors even though its unsecured creditors have not been paid in full. This question is not properly raised here by the REA because the Seventh Circuit recognized no such exception. Instead the Court of Appeals applied the absolute priority rule to the specific and unique facts found by the Bankruptcy Court, reviewed and accepted by the District Court and the Seventh Circuit and binding on REA here, and concluded, primarily as a factual matter, that the rule was not violated. The Seventh Circuit did not purport to create an "exception" to the absolute priority rule as REA asserts, but instead explained why the rule had not been violated in this particular instance. Therefore, the only question that properly could be presented to this Court is:

> Did the Court of Appeals correctly find—based on the detailed facts found by the Bankruptcy Court and accepted by the District Court and settled legal principles previously determined by the Indiana Supreme Court and the Seventh Circuit—that Wabash Valley's Reorganization Plan does not violate the absolute priority rule because as a state-regulated, not-for-profit public utility, Wabash Valley's Members have no equity interest in Wabash Valley, cannot receive any profits or dividends from Wabash Valley's continuing operations, have no claim to any of Wabash Valley's property even if it were liquidated, and retain the right to elect its board of directors because of provisions of their power supply contracts with Wabash Valley?

PARTIES TO THE PROCEEDING

REA's petition includes a list of the parties to this proceeding.

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BRIEF IN OPPOSITION OF RESPONDENT WABASH VALLEY POWER ASSOCIATION, INC.

Respondent Wabash Valley Power Association, Inc. ("Wabash Valley") opposes the petition filed by the Rural Electrification Administration ("REA"). REA fails to identify any substantive conflict between the decision of the Seventh Circuit here and this Court's decision in *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988), or the Tenth Circuit's decision in *Unruh v. Rushville State Bank*, 987 F.2d 1506 (10th Cir. 1993), nor does the petition raise any important question of federal law requiring resolution by this Court. REA's petition should be denied because:

1. The Seventh Circuit's decision is extremely fact-specific and is based upon facts unique to Wabash Valley. REA consistently ignores the extensive findings of fact by the Bankruptcy Court regarding the Wabash Valley Plan that were affirmed by both the District Court and the Seventh Circuit. Those factual findings, which are binding on REA here, contradict every material assertion that REA makes regarding the Wabash Valley Plan.

2. REA mischaracterizes the Seventh Circuit's decision as creating an exception to the absolute priority rule for all not-for-profit cooperatives. The Seventh Circuit created no such exception. The Seventh Circuit correctly decided that based upon the unique legal and contractual relationship between Wabash Valley and its Members and Wabash Valley's status as a state-regulated, not-for-profit public utility, the Wabash Valley Reorganization Plan does not violate the absolute priority rule. The Members have no equity interest in Wabash Valley, and cannot profit at REA's expense now or in the future.

Wabash Valley's situation is clearly distinguishable from the for-profit farmers in *Ahlers* and *Unruh* who retained the "right to the future profits of their farms," *Unruh*, 987 F.2d at 1508, as well as their interests in the land that could be liquidated at a profit in the future. The Members' right to elect Wabash Valley's directors results from the power supply contracts that Wabash Valley assumes as part of its Plan, not because of their pre-petition interest in Wabash Valley.

3. The outcome below was determined largely by previous decisions by the Indiana Supreme Court and the Seventh Circuit, to which REA and Wabash Valley were parties and which REA never requested this Court to review, holding that Wabash Valley cannot raise rates to repay REA's loan guarantees because Marble Hill was never used and useful, and that REA cannot preempt state rate regulation to impose rate increases to repay any part of its Marble Hill loan guarantees.

4. The Seventh Circuit properly recognized that the Wabash Valley Plan "makes economic sense" because it maximizes the recovery for REA and other creditors. REA abandoned its own Plan before the Seventh Circuit, arguing instead that Wabash Valley must be liquidated even though as a result of REA's *de facto* auction of Wabash Valley, its Members are paying more for Wabash Valley than anyone else offered and the creditors will receive $457 million under the Wabash Valley Plan—including $431 million for REA (65% of its pre-petition claim)—or $282 million more than the $175 million they would realize through liquidation of Wabash Valley's physical assets, the only alternative now offered by REA.

5. The Seventh Circuit properly rejected REA's unsupported assertions of harm to REA's lending program. The

Seventh Circuit correctly concluded that REA's loan guarantees to Wabash Valley are governed by idiosyncratic legal and factual circumstances that cannot adversely affect REA's relationships with other borrowers.

6. The Seventh Circuit also correctly dismissed REA's claim of absolute power to veto Wabash Valley's Plan as inconsistent with the express language of the Bankruptcy Code and contrary to the clear public policy that Congress incorporated in Chapter 11 to promote the rehabilitation of debtors, especially where creditors like REA ignore economic reality and seek to liquidate the debtor regardless of the cost to itself and others.

OPINIONS BELOW

In addition to the opinions in REA's Appendix, there are three previous decisions (copies of which are included in Appendices A, B and C), to which REA and Wabash Valley were parties and which REA never asked this Court to review, that are largely determinative of the arguments REA makes in its petition. The opinion of the Indiana Supreme Court in Wabash Valley's Marble Hill rate case denying any rate increase to repay Marble Hill indebtedness because the project was never "used and useful" in providing public utility service is reported at 552 N.E.2d 23 (App. A). The two previous opinions by the United States Court of Appeals for the Seventh Circuit rejecting REA's attempts to preempt state regulation of Wabash Valley's rates are reported at 903 F.2d 445 (App. B) and 988 F.2d 1480 (App. C).

STATEMENT OF THE CASE

REA's "Statement" misstates or ignores numerous material findings of fact by the Bankruptcy Court that were reviewed and accepted by both the District Court and the Seventh Circuit. These findings demonstrate that review by this Court is unwarranted because the issue that REA seeks to raise turns on the specific facts of this case that were decided adversely to REA. These factual findings are binding on REA because it never sustained its burden of establishing that these were clearly erroneous. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985).

Wabash Valley's Regulated, Not-for-Profit Status

Wabash Valley is a not-for-profit generation and transmission electric cooperative ("G&T") organized under Ind. Code §§ 23-7-1.1-1 *et seq.* (App. 70a ¶ 2)[1] The Indiana Utility Regulatory Commission ("IURC") regulates the rates Wabash Valley charges its Members and requires that rates be sufficient to cover only actual power supply costs and a modest capital reserve. (App. 73-74a ¶¶17-18; App. 137a ¶164) If Wabash Valley collects revenues that exceed its actual power supply costs, the IURC requires those overpayments to be credited against future fuel cost increases. (App. 74a ¶18) Indiana law precludes Wabash Valley, as a not-for-profit corporation, from paying any earnings or dividends to its Members. (App. 70a

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[1] Record references are to REA's appendix and the separately numbered paragraphs in the Bankruptcy Court's Findings of Fact. Factual statements in the Bankruptcy Court's Conclusions of Law stand as additional Findings of Fact. (App. 167a ¶246)

¶4) Under Indiana law and Wabash Valley's articles of incorporation, the Members cannot receive or retain any interest in Wabash Valley's assets that can be sold or liquidated at a profit, and upon dissolution of Wabash Valley, any assets remaining after payment of debts and return of capital contributions escheat to the State. (*Id.*)

The Supply Contracts and REA's Marble Hill Loan Guarantees

In 1977, Wabash Valley entered into forty-year (later extended for another ten years) all-requirements wholesale power supply contracts ("Supply Contracts") with each of its Members. (App. 72-73a ¶14) Those agreements require IURC regulation of Wabash Valley's rates on a not-for-profit basis and give the Members the right to elect Wabash Valley's directors. (App. 73a ¶15; App. 135a ¶158) If either of these conditions were violated by Wabash Valley (or a successor), this would cause Wabash Valley to breach the agreements and the Members could purchase their power requirements elsewhere. (App. 89-91a ¶¶55-58; App. 134-135a ¶¶157-159)

REA actively encouraged Wabash Valley and other G&Ts to invest in nuclear power plants. (App. 75a ¶20 n.5) Beginning in 1978 Wabash Valley invested approximately $460 million in the Marble Hill nuclear plant that Public Service Company of Indiana ("PSI") was constructing. (App. 75a ¶20) REA approved the Supply Contracts as the primary collateral for its Marble Hill loan guarantees; REA did not seek further repayment guarantees from Wabash Valley's Members. Although the Supply Contracts were patterned after REA's form agreement, the requirement that the IURC must approve the

rates Wabash Valley charges is *not* a standard REA provision. (App. 73a ¶16) REA admitted that it was not aware of any other power supply contract securing REA loans that includes such a specific state rate regulation requirement. (App. 73a ¶16; App. 113a ¶111)

Wabash Valley's Marble Hill Rate Case

Following PSI's cancellation of Marble Hill, Wabash Valley prosecuted fraud and other claims against PSI and Marble Hill contractors that resulted in a recovery of over $185 million for the benefit of REA and the other creditors. (App. 78-80a ¶¶27-33) Wabash Valley also tried to restructure its loans with REA and, at REA's insistence, filed a petition for IURC approval for a 51% rate increase to repay the Marble Hill debt. (*Id.*) REA and another Wabash Valley creditor, the National Rural Utilities Cooperative Finance Corporation ("CFC"), intervened and participated fully in the Marble Hill rate case. (App. 75-76a ¶21 n.6) Applying Indiana's "used and useful" rule,[2] the IURC dismissed Wabash Valley's petition. (App. 75-76a ¶21) The Indiana Court of Appeals and Supreme Court subsequently affirmed the IURC's decision and held that because Marble Hill was never "used and

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[2] The Indiana courts applied this same standard to deny any recovery of sunk costs for two Indiana investor-owned utilities, NIPSCO and PSI, that also had invested substantial amounts in canceled nuclear power plants. *See Citizens Action Coalition of Indiana, Inc. v. Northern Ind. Pub. Serv. Co.*, 485 N.E.2d 610, 614-615 (Ind. 1985), *cert. denied*, 476 U.S. 1137 (1986); *Citizens Action Coalition of Indiana, Inc. v. Pub. Serv. Co. of Ind., Inc.*, 552 N.E.2d 834, 837, 840 (Ind. App. 1990); and *Citizens Action Coalition of Indiana, Inc. v. PSI Energy, Inc.*, 664 N.E.2d 401, 403-404 (Ind. App. 1996).

useful," Wabash Valley cannot raise rates to repay the Marble Hill loan guarantees. *Nat'l Rural Utilities Coop. Fin. Corp. v. Public Service Comm'n of Ind.*, 552 N.E.2d 23, 27-28 (Ind. 1990) (App. A 9-10), *aff'g* 528 N.E.2d 95 (Ind. App. 1988). REA was a moving party in the appeals to the Indiana Court of Appeals and Supreme Court. REA did not seek review of the Indiana Supreme Court's decision by this Court.

As of the petition date, Wabash Valley owed REA $669 million, of which approximately $540 million was Marble Hill-related. (App. 76-77a ¶ 23)

REA's Attempts to Preempt State Regulation of Wabash Valley's Rates

After the Indiana Court of Appeals affirmed the dismissal of Wabash Valley's request to raise rates to pay for Marble Hill, REA sent letters to Wabash Valley, the IURC and the Michigan Public Service Commission purporting to preempt state regulation of Wabash Valley's rates. (App. 85a ¶45) The Seventh Circuit unanimously affirmed the District Court's conclusion that REA's conduct was "arbitrary, capricious, not in accordance with law, and of no force and effect whatever," stating that "[a]fter all, the REA made its loans and guarantees on the assumption that state regulation would apply." *Wabash Valley Power Ass'n, Inc. v. Rural Electrification Administration*, 903 F.2d 445, 455 (7th Cir. 1990) (App. B 20), *aff'g* 713 F. Supp. 1260 (S.D. Ind. 1989) ("*Wabash Valley v. REA I*"). The Court of Appeals also ruled that claim preclusion barred REA from raising an implied preemption argument when REA had failed to make such an assertion in Wabash Valley's Marble Hill rate case.

Id. REA did not ask this Court to review the Seventh Circuit's decision.

On the eve of the confirmation hearing, REA once again tried to preempt state regulation of Wabash Valley's rates, this time by formal rulemaking. (App. 86a ¶47) And once again both the District Court and Seventh Circuit held that REA lacked authority to preempt state rate regulation on an *ad hoc* basis whenever rates did not generate sufficient revenues to repay REA loans. *Wabash Valley Power Ass'n, Inc. v. Rural Electrification Administration*, 988 F.2d 1480 (7th Cir. 1993) (App. C), *aff'g* 773 F. Supp. 1178 (S.D. Ind. 1991) ("*Wabash Valley v. REA II*"). The Seventh Circuit reasoned that the Rural Electrification Act reflected the assumption by Congress that "REA could protect itself by setting conditions on the extension of credits," including commitments by state regulators to set rates high enough to enable loan repayment. App. C 23-24, 988 F.2d at 1490-91. The Seventh Circuit stated that "REA failed to so qualify its loan guarantees to Wabash Valley" and that "[d]istilled to its essence, the REA would have Wabash Valley's subscribers absorb the losses stemming from Wabash Valley's default and the REA's mishandling of its security arrangement." App. C 24, 988 F.2d at 1491. The Court of Appeals concluded that REA lacked the authority to dictate who shall bear the risk of non-payment, especially because the reasonable interpretation of "the structure and operation of the subsidies provided through the REA reflect a congressional preference for the government's bearing this risk, rather than cooperative members." *Id.* Once again, REA did not seek review by this Court.

Valuation of Wabash Valley

REA does not mention, much less challenge in its petition, the exhaustive consideration that the courts below gave to the valuation of Wabash Valley, even though valuation is a critical step in the reorganization process because it defines how much Wabash Valley's creditors can recover and whether Wabash Valley should be reorganized and continue operations or be liquidated. The parties stipulated that the liquidation value of Wabash Valley's physical assets was $175 million. (App. 81a ¶36; App. 136a ¶160) The Bankruptcy Court found—and the District Court affirmed (App. 48a)—that Wabash Valley's fair market value as a going concern was no more than $190 million. (App. 136-154a, in particular ¶201) Wabash Valley's going concern value was limited by its unique status as a regulated not-for-profit utility where its principal asset, the Supply Contracts, require state regulation of Wabash Valley's rates on a not-for-profit basis and give the Members the right to elect Wabash Valley's directors. (App. 135a ¶158) If these contract rights were breached, the Supply Contracts would not be enforceable against the Members and they would be free to purchase their power requirements elsewhere. (App. 134-135a ¶¶157-159)

The Bankruptcy Court also valued Wabash Valley based on the cost savings it provides for its Members compared to alternative power sources. (App. 98-102a ¶¶75-85) The Court found that Wabash Valley was more valuable to its Members than to any other potential buyer "because Wabash Valley is tailored exactly to their requirements" (App. 101a ¶82), and that $221.7 million was the most that Wabash Valley's Members would pay to continue its operations, or what one witness referred

to as "the maximum value you could possibly squeeze out . . . of [the Members] before it would pay them to go find other arrangements." (App. 155-158a ¶¶207-209, 213) The Seventh Circuit specifically affirmed the Bankruptcy Court's findings on the Supply Contracts and valuation as not clearly erroneous. *In re Wabash Valley Power Ass'n, Inc.*, App. 5-12a, 72 F.3d at 1309-1313.

The valuations of Wabash Valley were corroborated by the fact that REA had conducted a *de facto* auction of Wabash Valley, and no buyer was willing to offer more than the $221.7 million that the Members pay under the Wabash Valley Plan. REA conceded having received "expressions of interest" from three utilities—two for-profit, investor-owned utilities, PSI and Indianapolis Power & Light, and Big Rivers, a Kentucky-based G&T—and that PSI had made "a very formal offer" to REA. (App. 112-114a ¶¶110, 114; App. 182-183a ¶38) REA rejected the PSI offer, never advised the Court of the terms PSI offered, nor did REA ever seek the Court's approval of *any* offer to acquire Wabash Valley. (*Id.*) The Bankruptcy Court made a specific finding that "the reasonable inference is that none of the utilities that had expressed interest in acquiring Wabash was willing to submit a bid that surpassed what Wabash is proposing to pay REA and the other creditors . . . . [I]f REA had received a better offer, REA certainly would have presented that offer for the Court's consideration. REA never did." (App. 182-183a ¶38)

Under the Wabash Valley Plan, REA and the other creditors will receive payments having a present value of $457 million (including Marble Hill-related settlements worth at least $185 million that Wabash Valley obtained), compared with only $175 million if Wabash

Valley's tangible, useful assets were liquidated. (App. 67a; App. 81a ¶36) Simply put, under the Wabash Valley Plan REA and the other creditors will receive *$282 million more* than they will under the only alternative now proposed by REA, liquidation. REA will receive nearly $431 million under the Wabash Valley Plan (App. 67a), or $256 million more than it would recover if Wabash Valley were liquidated.

REASONS FOR DENYING THE WRIT

I.

THE SEVENTH CIRCUIT DID NOT CREATE AN EXCEPTION TO THE ABSOLUTE PRIORITY RULE FOR NOT-FOR-PROFIT COOPERATIVES.

REA misstates or ignores binding factual findings and settled legal principles to give the false impression that the Seventh Circuit created "an exception to the absolute priority rule for not-for-profit cooperatives." (REA Pet. 8, 12, 14, 17, 18)

The Seventh Circuit never even suggested such an exception. The Court of Appeals properly applied the absolute priority rule and concluded that the Members' right to choose the directors of the reorganized Wabash Valley does not violate the rule because based upon Wabash Valley's unique circumstances the Members have no equity interest in Wabash Valley and no present or future ability to profit at REA's expense.

REA ignores that the Seventh Circuit explicitly applied the absolute priority rule to "the unusual structure of the entities involved"—particularly the Members' unique interests in Wabash Valley which is both a not-for-profit *and* regulated cooperatively owned utility—that made

"the rules of Chapter 11 bankruptcy, primarily designed as they are for profit-seeking enterprises . . . less than straightforward to apply here." App. 15-17a, 72 F.3d at 1313-1314. The Court of Appeals ultimately concluded that "[b]ecause of the way in which the rights of the Members of Wabash are constrained both by state law and by the organization's own bylaws, we believe the Members may continue in control of the reorganized co-operative *without violating the absolute priority rule.*" App. 20a, 72 F.3d at 1315 (emphasis added). The Seventh Circuit further noted that *"[b]eyond complying with the rule*, this outcome also seems to make economic sense, since it maximizes the value available to meet creditor claims." *Id.* (emphasis added).

Under the absolute priority rule as incorporated in 11 U.S.C. § 1129(b)(2)(B)(ii), the question is whether Wabash Valley's Members are "old equity" holders who have traded on their "insider" status to acquire "new equity" in the reorganized Wabash Valley while REA receives less than full repayment of its unsecured claim. App. 19a, 72 F.3d at 1318. The short answer is that the Members have no "equity interest" in Wabash Valley. The findings of facts by the Bankruptcy Court (App. 70-78a ¶¶2, 4, 14-15), which the Seventh Circuit sustained (App. 16a, 72 F.3d at 1313), establish that under the governing Indiana statutes and Wabash Valley's articles of incorporation and bylaws, the Members cannot receive any profits or dividends, and they have no present or prospective ownership interest in Wabash Valley's assets that can be sold or liquidated at a profit. In the Marble Hill rate case, the Indiana Supreme Court previously determined that the Members are not "investors" in Wabash Valley, App. A 7-8, 552 N.E.2d at 27, a decision that is binding

on REA here. In *Wabash Valley v. REA I*, another panel of the Seventh Circuit similarly concluded that "non-profit utilities are not supposed to make 'profits' and do not have 'equity investments' in the legal sense. . . ." App. B 7, 903 F.2d at 449. The Seventh Circuit thus properly concluded here that under Indiana law, Wabash Valley's articles of incorporation and bylaws, the Members have no equity interest in Wabash Valley.

Similarly, the Members' right to elect the directors of the reorganized cooperative does not violate the absolute priority rule. The Supply Contracts, which Wabash Valley assumes under 11 U.S.C. § 365, require that the IURC continue to regulate Wabash Valley's rates on a not-for-profit basis and that the Members retain the right to elect Wabash Valley's directors. The Seventh Circuit affirmed the Bankruptcy Court's findings (App. 89-92a ¶¶55-60; App. 134-135a ¶¶157-158) that a violation of either of these conditions would breach the Supply Contracts and free the Members to purchase their power requirements elsewhere. App. 10a, 72 F.3d at 1311. Wabash Valley must assume the Supply Contracts in their entirety so that the Members remain obligated to purchase their power requirements from Wabash Valley, thus producing a future income stream for the benefit of REA and the other creditors. If the Supply Contracts were invalidated and Wabash Valley liquidated as REA proposes, REA would receive *$256 million less* than it will under the Wabash Valley Plan.

In this connection, the Seventh Circuit noted that "control" alone is not the determinative issue and that the absolute priority rule is implicated only where those in control can realize a financial gain by sharing in the reorganized entity's profits or assets. App. 29a, 72 F.3d

at 1318. The Seventh Circuit correctly concluded that Wabash Valley's Members "are not owners in any usual sense of the term," App. 16a, 72 F.3d at 1313, because there is no possibility that the Members can profit, now or in the future, at REA's expense. The Seventh Circuit explained how Wabash Valley's unique status as a *regulated and not-for-profit* electric utility clearly distinguishes Wabash Valley from the for-profit farmers in *Ahlers* and *Unruh* who retained the "right to the future profits of their farms," 987 F.2d at 1508, as well as their interests in the land that could be liquidated at an appreciated value for a profit in the future:

> Pursuant to state law and the rules of the cooperative, Wabash Members receive no profits, nor do they have any current or prospective ownership rights in the corporate assets. Under Indiana law any assets remaining to the cooperative after a liquidation or dissolution escheat to the state.
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> * * *
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> Control of the cooperative provides no opportunity, either currently or in the future, for the Members to obtain profits or any equity in Wabash's assets and control itself is not an equity interest. Further, control of Wabash's Board provides the Members with no opportunity to benefit at REA's expense. App. 16a, 33a, 72 F.3d at 1313, 1320.[3]

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[3] In return for their agreement to purchase their power requirements from Wabash Valley for forty years, the Members bargained for and received certain rights to protect their interests, including the rights to elect Wabash Valley's directors and to have the IURC regulate its rates. (App. 89-91a ¶¶55-58; App. 134-135a ¶¶157-159) The Wabash Valley Plan allows the

(continued...)

Wabash Valley is unique because none of the incidents of control of a for-profit business exists. Under the binding facts found by the Bankruptcy Court and the legal principles settled by prior decisions of the Indiana Supreme Court and the Seventh Circuit, Wabash Valley cannot earn a profit from ongoing operations, nor can it pay a dividend to the Members.[4] And unlike the debtors in *Ahlers* and *Unruh*, the Members have no current or prospective ownership interest in Wabash Valley's assets that can be sold or liquidated at a profit.[5] Under these specific circumstances, the Members' right to "control" the reorganized Wabash Valley by continuing to elect its directors is clearly distinguishable from the typical for-

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[3] (...continued)
Members to maintain the system of governance and communications that they have developed over many years to share information and resolve common issues through collective efforts.

[4] That the Seventh Circuit's decision was grounded upon legal and factual considerations that are unique to Wabash Valley is demonstrated by the fact that the Court of Appeals considered and distinguished other "not-for-profit" cases such as *In re Eastern Maine Electric Coop., Inc.*, 125 B.R. 329 (Bankr. D.Me. 1991), as "decided under Maine law and under different corporate articles and bylaws. . . ." App. 23a, 72 F.3d at 1316. The Court of Appeals further stated that "relevant decisions of the [Indiana] state courts involving Wabash and the particulars of the Wabash bylaws both distinguish this case" from *Eastern Maine*. App. 25a, 72 F.3d at 1317.

[5] *Ahlers* is also distinguishable because the debtors did not contest the conclusion that their retaining an equity interest in the for-profit farm violated the absolute priority rule. 485 U.S. at 202. Moreover, unlike here where *all* creditors will receive substantially more under the Wabash Valley Plan, only the wholly unsecured creditors fared better under the debtors' plan in *Ahlers*. *Id.* at 206.

profit debtor. There is no possibility that the Members can "profit" in the future while REA receives less than full repayment of its unsecured claim.[6]

REA effectively concedes this point and argues instead that the Members may benefit by paying lower prices for power if Wabash Valley remains in existence. But that is precisely the reason for a not-for-profit cooperatively owned electric utility. The Seventh Circuit correctly held that this "potential for lower prices" does not implicate the absolute priority rule because such lower rates are not "property received on account of an equity interest." App. 28a, 72 F.3d at 1318. The rates that the Members pay are a result of Wabash Valley's unique status as a *state-regulated*, not-for-profit utility. Indiana law requires the IURC to set Wabash Valley's rates to cover only its actual power supply costs. If Wabash Valley's rates produce revenues beyond those costs, those overpayments must be credited against fuel cost increases. (App. 10a, 72 F.3d at 1311; App. 74a ¶18; App. 137a ¶164) As the

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[6] Contrary to REA's contention (Pet. 8 n.6), the Seventh Circuit did not reach the so-called "new value exception" to the absolute priority rule in this case, App. 19a, 72 F.3d at 1315, and, therefore, this is not an issue properly raised by REA's petition. Nevertheless, the Wabash Valley Plan also satisfies the new value exception because the Members will make "a substantial, necessary, and fair new value contribution" of $3.2 million. *See generally In re Bonner Mall Partnership*, 2 F.3d 899, 908-909 (9th Cir. 1993), *cert. dismissed and vacatur motion denied sub nom. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. ___, 115 S. Ct. 386 (1994). Although in *Ahlers* this Court declined to reach the issue whether this exception survived the adoption of the 1978 Bankruptcy Code, "the majority of courts that have considered the question have held that the new value exception is alive and well." *Id.* at 907.

Seventh Circuit stated, Wabash Valley's assumption of the Supply Contracts under its Plan (and under 11 U.S.C. § 365) "will obligate the Members to fulfill all their obligations under the Contracts and will entitle them to all the benefits of the Contracts including the right to name Wabash's Board of Directors." App. 14a, 72 F.3d at 1312-1313. The Members' primary obligation under the Supply Contracts is to purchase their power requirements from Wabash Valley until 2027. Wabash Valley has corresponding contractual obligations, including the requirement to provide reliable service to the Members at the lowest possible cost. REA understood and approved those provisions of the Supply Contracts as the primary collateral for its Marble Hill loan guarantees. Under these circumstances, Wabash Valley's contractual obligation to seek and obtain power supply options that may result in lower prices for the Members does not implicate, much less violate, the absolute priority rule.

Moreover, REA could not recover any more than what it will receive under the Wabash Valley Plan even if there were an equity interest in Wabash Valley that REA could assume. REA is bound by the Bankruptcy Court's finding, reviewed and accepted by the Seventh Circuit (App. 122a, 72 F.3d at 1312), that Wabash Valley's maximum value is the $221.7 million that the Members will pay under the Wabash Valley Plan. Even if REA controlled Wabash Valley, it could not earn a profit or pay a dividend to itself because under settled principles of Indiana law and the Supply Contracts, Wabash Valley's rates must cover only actual power supply costs. If REA tried to set higher rates, IURC regulations require that "any excess of revenues over expenses and

over a limited reserve must be credited against fuel adjustment charges." App. 10a, 72 F.3d at 1311.

In any event, the Bankruptcy Court valued the future benefits to the Members of being able to aggregate their power purchases through Wabash Valley (the $31.7 million difference between Wabash Valley's $190 million going-concern value and the $221.7 million value to the Members), and that amount will be paid to REA and CFC on their unsecured claims. The Bankruptcy Court correctly concluded that by identifying and paying this "significant tangible premium" for the benefit of REA and the other creditors, "there is no residual economic benefit for Wabash's Members." (App. 184-186a ¶¶41, 45) Thus, even if the benefits of possible lower prices in the future implicated the absolute priority rule, which they do not, under the Wabash Valley Plan the Members pay the creditors the full value of any price benefits they may obtain through a reorganized Wabash Valley.

The Bankruptcy Court's valuation analysis and findings are also dispositive of REA's argument (REA Pet. 19) that the reorganized Wabash Valley could convert to a for-profit entity. First, REA ignores the fact that the Supply Contracts require Wabash Valley to be operated as a regulated, not-for-profit utility. (App. 67a; App. 89-91a ¶¶56-58) Second, the Bankruptcy Court's $190 million going concern valuation of Wabash Valley was premised upon a sale to a for-profit purchaser and the conversion of Wabash Valley to a for-profit utility. (App. 92-98a ¶¶61-74; App. 136-141a ¶¶160-175)[7] Finally, the two for-

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[7] As part of its valuation findings, the Bankruptcy Court found that the Members have no incentive to renegotiate the (continued...)

profit utilities that expressed interest in acquiring Wabash Valley and converting it into a for-profit enterprise were not willing to submit bids that even matched the $221.7 million that the Members will pay under the Wabash Valley Plan. (App. 182-183a ¶38) Contrary to REA's speculation, the fact is that the market placed a very low value on the opportunity to convert Wabash Valley to a for-profit entity.

REA's real complaint is that it has not been able to impose any rate increase to repay the Marble Hill loan guarantees. REA's position is untenable because it ignores the dispositive holding by the Indiana Supreme Court and two previous decisions by the Seventh Circuit holding that REA cannot preempt state rate regulation to raise Wabash Valley's rates to pay for Marble Hill. As the Seventh Circuit previously recognized, REA's predicament is simply because REA accepted as its primary collateral Supply Contracts "with Wabash's customers that oblige them to pay no more than the state rate; it did not secure [member] guarantees." *Wabash Valley v. REA I*, App. B 16, 903 F.2d at 453. The current panel of the Seventh Circuit reached the same conclusion: "Two factors *outside the Members' control* have prevented REA from collecting more of its outstanding debt: the nonprofit structure of cooperatives and, most important, the fact that the only conceivable source of funds—increased rates—is foreclosed by state law and the prior decisions of this court." App. 33a, 72 F.3d at 1320 (emphasis

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[7] (...continued)
Supply Contracts to a for-profit basis unless this would result in rates lower than what the Members would pay their "host" investor-owned utilities if Wabash Valley ceased to exist. (App. 139-140a ¶171)

added). In particular, the "principal reason" the Supply Contracts did not provide a reliable source of revenue to repay the Marble Hill loan guarantees "was the refusal of Indiana regulators to recognize Marble Hill as an asset for ratemaking purposes," a risk that REA knew or should have known of as a promoter of nuclear power. App. 31a, 72 F.3d at 1319.

In short, there is no basis for REA's assertion that the Seventh Circuit created a new exception to the absolute priority rule for not-for-profit cooperatives. The Seventh Circuit's decision rests instead on the unexceptional holding that the question of compliance with the absolute priority rule must be answered by close examination of the governing law and specific facts of each case. Here, the Seventh Circuit carefully applied the rule to Wabash Valley's one-of-a-kind circumstances and found no violation.

II.

THE SEVENTH CIRCUIT CORRECTLY RECOGNIZED THAT THE WABASH VALLEY PLAN MAXIMIZES THE CREDITORS' ECONOMIC RECOVERY, AND THE DECISION BELOW WILL NOT ADVERSELY AFFECT REA'S ABILITY TO RECOVER LOANS TO OTHER RURAL ELECTRIC COOPERATIVES.

REA tries to buttress its petition by suggesting (a) that the Seventh Circuit "improperly speculated that [REA] would be better off under the Wabash Plan than under other alternatives" (REA Pet. 11 n.9); and (b) that the decision below will adversely affect its ability to collect loans to other rural electric cooperatives. (REA Pet. 9, 19) Both of REA's arguments are not properly part of the question REA purports to present, and both are clearly contrary to the facts as found by the courts below.

A. The Undisputed Findings By the Bankruptcy Court Clearly Show that REA Will Recover Substantially More Under the Wabash Valley Plan than REA's Only Alternative, Liquidation.

Contrary to REA's suggestion, the Court of Appeals was not speculating when it observed that the Wabash Valley Plan "makes economic sense" because REA will recover far more than under REA's only alternative, liquidation. REA does not dispute that under the Wabash Valley Plan all creditors will receive $457 million, and REA's share is nearly $431 million. Because REA now has abandoned its own Plan, REA's only alternative to the Wabash Plan is liquidation of Wabash Valley's physical assets which will yield *$282 million less*. Given the constraints of Indiana rate regulation that absolutely prohibit a rate increase to pay for Marble Hill, App. 31a, 72 F.3d at 1319, the Seventh Circuit correctly concluded that the Members' "continuation as customers in control of Wabash is a means of maximizing the value of the estate for the benefit of creditors." App. 27-28a, 72 F.3d at 1318.[8]

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[8] The Court of Appeals recognized that the higher return for REA under the Wabash Valley Plan "does not excuse compliance with the absolute priority rule, but it is nonetheless a fact of which we must remain aware." App. 32a, 72 F.3d at 1320. REA's steadfast demand for liquidation confounds common sense. A financially accountable commercial lender could never rationalize insisting upon an option that results in a $256 million loss for itself (and $282 million for all creditors).

B. The Decision Below is Limited to Wabash Valley's Unique Circumstances and Will Not Affect REA's Ability to Collect Loans to Other Rural Electric Cooperatives.

Equally misplaced are REA's assertions that the decision below will adversely affect REA's loans to other rural electric cooperatives. REA submitted no evidence below to support these claims.[9] And once again REA ignores the numerous facts, found below and binding on REA, that are unique to REA's Marble Hill loan guarantees and that establish that Wabash Valley's situation is *sui generis* and will not recur if REA places appropriate conditions on extensions of credit. The critical fact concerning REA's Marble Hill loan guarantees is that REA accepted as its collateral Supply Contracts that are expressly conditioned upon state rate regulation which, in turn, resulted in the application of Indiana's used-and-useful rule when PSI abandoned Marble Hill. This pro-

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[9] REA's conduct contradicts the argument it makes here. REA recently agreed to write off $982 million of the $1.22 billion (for a net recovery of $237 million) that another G&T, Soyland Power Cooperative, had borrowed with REA loan guarantees to invest in Illinois Power's Clinton nuclear plant. *The Wall Street Journal*, at A-4 (September 16, 1996); *Electric Utility Week*, at 3 (September 23, 1996). REA's decision to accept this writedown has nothing to do with the Seventh Circuit's decision here since Soyland had not filed for reorganization and operates in a state, Illinois, that does not regulate cooperatives' rates. REA also recently agreed to write down $530 million in loans to Deseret Generation & Transmission Cooperative as part of a larger REA bailout of its "troubled" borrowers. *The Wall Street Journal*, at A-3 (October 3, 1996). REA's insistence that Wabash Valley be liquidated is inexplicable if REA's objective actually were to maximize its recovery on troubled loans. Liquidation of Wabash Valley would mean that REA would receive $256 million less than it would receive under the Wabash Valley Plan.

vision is unique to the Wabash Valley Supply Contracts. (App. 73a ¶15; App. 135a ¶158)

REA has no basis to suggest that the outcome here poses a "significant threat . . . to [REA's] legitimate . . . expectations" as a creditor. (REA Pet. 19-20) If Marble Hill was not completed—clearly a foreseeable risk for REA as lender—the reasonable expectation was that the IURC would apply Indiana's longstanding used and useful rule and bar any recovery of Marble Hill costs through rates. As the Indiana Supreme Court stated: "At the time the Wabash loan was approved, the REA administrator knew or should have known that Wabash's requirements contracts with its members served as the security for the loan and that those contracts provided that the rates paid by the members had to be approved by the [Indiana] commission, and this knowledge was or should have been factored into REA's decision to make the loan." App. A 12-13, 552 N.E.2d at 29.

REA's unsupported concerns about its relations with other borrowers hardly are a sufficient basis for this Court to grant review. This is particularly true because REA has the responsibility to insure that its loans are properly collateralized. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 729 (1979) (rejecting argument that "nationwide standards favoring claims of the United States are necessary . . . to safeguard the Federal Treasury from defaulting debtors."). The Seventh Circuit summarized REA's remedy in *Wabash Valley v. REA I*:

> Congress' assumption when it created the Rural Electrification Act in 1936 seems to have been that the REA could protect itself by setting conditions on the extension of credit. . . . The REA may refuse to make loans unless state agencies

> guarantee rates high enough to allow repayment. It may refuse to approve a loan unless the customers (whose promises to buy power are the real security for the debt) guarantee the loan or authorize the REA to dictate rates. If either state or customer balks, the REA may deploy its funds elsewhere. . . . The conditioning power is a big club, which can achieve (effective) preemption and more. . . . But REA did not use this power when extending credit [to Wabash Valley]. It approved contracts with Wabash's customers that oblige them to pay no more than the state rate; it did not secure [member] guarantees. App. B 15-16, 903 F.2d at 453.

REA also fails to inform this Court of a critical fact that differentiates Wabash Valley's situation from REA's other purportedly "troubled" borrowers. None of REA's loans to other G&Ts involves a project like Marble Hill that was abandoned before completion. In all other instances, REA has a security interest in actual "used and useful" assets that were completed and have substantial value. For example, another major REA G&T borrower involved in a bankruptcy proceeding is Cajun Electric Power Cooperative, and several bidders have offered roughly $1 billion to acquire Cajun's non-nuclear generating assets that were financed with REA loan guarantees. *Electric Utility Week*, at 14 (September 2, 1996).[10] In addition, REA's predictions of imminent financial ruin are belied by the fact that only a small minority of states

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[10] The financial problems of another REA G&T borrower, Big Rivers, that recently filed for bankruptcy relate to a surplus of high-cost generating capacity, not a project like Marble Hill that was abandoned before completion. *Electric Utility Week*, at 1 (September 30, 1996).

regulate cooperatives' rates, *Wabash Valley v. REA I*, App. B 2, 903 F.2d at 448, and an even smaller minority strictly apply the used-and-useful rule. And even the Indiana statutes were amended in 1985 to allow utilities to recover through rates prudent expenditures for post-April 1985 capital projects abandoned before completion, provided the IURC previously had reviewed and certificated such projects. *See* Ind. Code §§ 8-1-8.5-1 *et seq.*

Finally, because the Seventh Circuit's decision is limited by Wabash Valley's idiosyncratic factual and legal considerations—most especially its status as a regulated and not-for-profit public utility—this case does not, as REA asserts (REA Pet. 9, 19), provide a "roadmap" for other non-profit debtors such as homeowners' associations to avoid compliance with the absolute priority rule.[11] On the contrary, in the decision below and in its two previous preemption decisions, the Seventh Circuit provided REA with a detailed "roadmap" of the conditions (*e.g.*, binding commitments by state regulators to set rates sufficiently high to repay loans and requiring Member guarantees) that REA could place on extensions of credit to protect its financial interests. *Wabash Valley v. REA I*, App. B 15-16, 903 F.2d at 453; *Wabash Valley v. REA II*, App. C 23-24, 988 F.2d at 1490-1491.

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[11] The Seventh Circuit never suggested that its decision extends to homeowners' associations or other nonprofit entities as REA suggests. (REA Pet. 17, 20-21) On the contrary, the Court of Appeals emphasized that Wabash Valley's defining characteristic is that its operations—and most significantly the rates it can charge—are regulated by the IURC pursuant to a comprehensive statutory scheme.

III.

REA'S ASSERTION OF AN UNQUALIFIED RIGHT TO VETO THE WABASH VALLEY PLAN HAS NO SUPPORT IN THE BANKRUPTCY CODE AND IS INCONSISTENT WITH THE PUBLIC POLICY THAT UNDERLIES CHAPTER 11.

The practical thrust of REA's petition is that as the principal creditor REA has an unreviewable right to liquidate Wabash Valley without any judicial "second-guessing" even if creditors receive much less through liquidation.[12] REA's position is refuted by clear statutory language and is plainly inconsistent with the public policy to rehabilitate debtors that underlies Chapter 11.

11 U.S.C. § 1129(a)(10) expressly provides that a plan may be confirmed over the dissent of one or more creditors if at least one class of impaired claims votes in favor of confirmation, even if the class holds a minority of the debt. *See generally Matter of Briscoe Enterprises, Ltd., II*, 994 F.2d 1160 (5th Cir.), *cert. denied,* 510 U.S. 992 (1993) (plan approved over objections of majority credi-

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[12] REA argues, for example, that a reorganization proceeding is nothing more than a device to sell the debtor to the creditors. (REA Pet. 11) In *Wabash Valley v. REA I*, App. B 19, 903 F.2d at 455, the Seventh Circuit concluded that REA "seeks not neutrality but preference" because REA attempted to preempt state regulation of Wabash Valley's rates even though the Indiana Commission and courts had applied the used-and-useful requirement in a nondiscriminatory fashion to all Indiana utilities, including Wabash Valley's partner in the Marble Hill project, PSI. *Wabash Valley v. REA II* rejected REA's attempt to manipulate the bankruptcy process to give REA the exclusive right to set the rates of any cooperative that files for bankruptcy as an invalid attempt by REA "to shift the risk of default on REA loans from the REA to cooperative members." App. C 4, 988 F.2d at 1483.

tor). Section 1129(b)(1) similarly provides that a court *"shall confirm"* a reorganization plan notwithstanding the objections of a class of creditors if the plan does not discriminate against and is fair and equitable with respect to each impaired, non-consenting class of claims. Had Congress intended to limit cramdown to cases where a plan is supported by creditors holding a majority of the debt, it easily could have drafted § 1129 to require that result. On the contrary "the very purpose of the Code's cramdown provision . . . is to allow the court, not the creditors, to decide whether a 'fair and equitable' plan should be confirmed over creditor objections." *In re Bonner Mall Partnership*, 2 F.3d at 915. REA has no unqualified right to derail confirmation of the otherwise "fair and equitable" Wabash Valley Plan, especially because REA now concedes that the Wabash Valley Plan satisfies all the other requirements for cramdown.

REA also ignores the fact that it is not the only party with an interest in Wabash Valley's bankruptcy. Other creditors such as CFC and PSI have a significant interest in Wabash Valley's continued operations. CFC did not appeal from the Bankruptcy Court's confirmation of the Wabash Valley Plan even though its pre-petition claim was roughly $35.5 million. (App. 77a ¶24) PSI, which also asserted over $140 million in claims (App. 77-78a ¶26), voted in favor of the Wabash Valley Plan. App. 14a, 72 F.3d at 1313.

Moreover, in adopting the statutory framework for reorganizations under Chapter 11 of the Bankruptcy Code, Congress articulated a strong policy in favor of the rehabilitation of debtors especially where a creditor, such as REA here, is intent on liquidating the debtor regardless of the cost to itself and others. *Briscoe Enterprises*,

994 F.2d at 1162 n.1 ("The policy is that the public good is served by rehabilitations and a law that prevents creditors from getting immediate satisfaction but gives the creditor as much as the creditor could get upon liquidation and compensates him or her for the delay is proper to force upon creditors."). REA's preference for a rule that prohibits electric cooperatives from ever filing for reorganization cannot be squared with the purpose of Chapter 11. "[W]hile the protection of creditors' interests is an important purpose under Chapter 11 . . . successful debtor reorganization and maximization of the value of the estate are the primary purposes." *In re Bonner Mall Partnership*, 2 F.3d at 915-916, *citing NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984) and *Toibb v. Radloff*, 501 U.S. 157, 163-164 (1991). These policy concerns are especially important here because REA's only alternative to the Wabash Valley Plan is liquidation and a much smaller recovery for all creditors. Chapter 11 was designed to avoid precisely such economically irrational liquidations, and by permitting reorganizations, "Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if 'sold for scrap.'" *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983).

CONCLUSION

REA fails to inform this Court of the unique circumstances of this case and further ignores or misstates numerous factual findings and settled legal principles that are binding on REA here. Contrary to REA's claims, the Seventh Circuit did *not* create a new exception to the absolute priority rule for not-for-profit cooperatives. The Court of Appeals carefully applied the absolute priority rule to Wabash Valley's unique circumstances as a regulated, not-for-profit cooperative and correctly found that the Wabash Valley Plan clearly satisfies the rule. The Wabash Valley Plan is also consistent with the rationale of the absolute priority rule because, based upon the Bankruptcy Court's findings of fact and the settled legal principles previously determined by the Indiana Supreme Court and the Seventh Circuit, the Members' control of the reorganized debtor provides them no opportunity to benefit at REA's expense. There is no possibility for the Members, either currently or prospectively, to obtain profits or any interest in Wabash Valley's assets that can be liquidated at a profit. The Seventh Circuit correctly noted that the Wabash Valley Plan also makes economic sense because the Members' continuation as customers in control of Wabash Valley maximizes the value of the estate for REA and the other creditors.

The bankruptcy process here worked well. Wabash Valley marshaled its assets and recovered over $185 million from the parties responsible for the Marble Hill debacle. As a result, REA and the other creditors receive a total recovery of $457 million—$431 million for REA alone—under the Wabash Valley Plan compared to the $175 million they would recover under REA's only alternative to the Wabash Valley Plan, liquidation.

For the foregoing reasons, Wabash Valley Power Association asks the Court to deny the petition.

Respectfully submitted,

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October 4, 1996

No. 96-342

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

IN THE MATTER OF WABASH VALLEY POWER ASSOCIATION, INC.

THE UNITED STATES OF AMERICA, ON BEHALF OF THE RURAL ELECTRIFICATION ADMINISTRATION,

Petitioner,

WABASH VALLEY POWER ASSOCIATION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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APPENDIX TO BRIEF IN OPPOSITION

APPENDIX A

NATIONAL RURAL UTILITIES
COOPERATIVE FINANCE CORPORATION,
Appellant,
v.
PUBLIC SERVICE COMMISSION OF INDIANA,
Wabash Valley Power Association, Inc.,
Office of the Utility Consumer Counselor,
City of Fort Wayne, Indiana, Public Service
Company of Indiana, Inc., Fruit Belt Electric
Cooperative, Jay County REMC, United REMC,
Warren County REMC, Boone County REMC,
Kankakee Valley REMC, and United States of
America on Behalf of Its Rural Electrification
Administration, Department of Agriculture, Appellees.

UNITED STATES of America, Appellant,
v.
PUBLIC SERVICE COMMISSION OF
INDIANA, et al.

No. 93S02-9003-EX-215

Supreme Court of Indiana.

March 21, 1990.

DeBRULER, Justice.

Appellants here are the Rural Electrification Administration of the United States government (REA) and National Rural Utilities Cooperative Finance Corporation (CFC), lenders who advanced funds to the Wabash Valley

Power Association (Wabash) to be used toward the completion of the Marble Hill nuclear power generation plant, a joint enterprise Wabash had undertaken in conjunction with Public Service Company of Indiana. Following the abandonment of construction at Marble Hill, Wabash filed a petition with the Public Service Commission of Indiana (now the Indiana Regulatory Commission) for a fifty-one percent rate increase intended to generate funds to pay project-related debts. The commission dismissed Wabash's petition with prejudice, noting that under this Court's holding in *Citizens Action Coalition v. Northern Indiana Public Service Co.* (1985), Ind., 485 N.E.2d 610 *(NIPSCO)*,[1] a utility may not recover sunk costs associated with the cancellation of a nuclear power project through a rate increase. The Court of Appeals affirmed the commission's decision, fully addressing the issues raised by REA and CFC in their appeal. *National Rural Utils. Coop. Fin. Corp. v. Public Serv. Comm'n* (1988), Ind. App., 528 N.E.2d 95. We grant the petitions for transfer and affirm pursuant to Indiana Rule of Appellate Procedure 11(B)(3). A brief summary of the resolution of the issues raised on appeal follows.

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[1] NIPSCO has twice appealed unsuccessfully from orders subsequently entered in that cause. The resolution of the latest appeal appears in *Northern Indiana Public Service Co. v. Citizens Action Coalition of Indiana, Inc.* (1989), Ind., 548 N.E.2d 153. That decision, which reaffirms our original holding that a utility cannot recover sunk costs associated with a failed nuclear facility through a rate increase and which clarifies the entitlement of ratepayers to interest on refunds and to attorneys' fees, does not affect the reasoning nor the validity of the Court of Appeals' decision in this case and will not be further cited in this opinion.

I. *The commission acted within its jurisdiction when it entered its order since the order constituted neither an advisory opinion nor a declaratory judgment.*

A.

REA argued that because Wabash did not strongly support its petition for a rate increase, there was no case or controversy before the commission and that the resulting order was therefore merely an advisory opinion, which the commission had no jurisdiction to enter. Jurisdiction requires an actual, existing justiciable controversy between adverse parties. One aspect of adverseness is the propriety and ability of one of the parties to call upon the tribunal to adjudicate its cause. Because all rate increases must be approved by the commission, it had primary jurisdiction to hear the petition, and as the entity seeking the increase, Wabash was the proper party to invoke the commission's jurisdiction. The validity and desirability of the proposed rate increase, which would have had an immediate and substantial impact on Wabash, its ratepayers, and its creditors, was vigorously contested by adversarial, interested parties and intervenors. The commission's order was a ruling on a live case or controversy and not an advisory opinion.

B.

REA argued that the commission exceeded its jurisdiction by issuing what amounted to a declaratory judgment. The commission's duty is to enter orders based on impartial findings of fact, and the commission is not empowered to enter declaratory judgments. REA contended that because no factual record existed as to whether Wabash was entitled to emergency rate relief, the com-

mission had issued a premature legal opinion, i.e., an impermissible declaratory judgment. However, these parties appeared before the commission to contest the merits of a proposed rate increase, not to have their rights, status, and relations determined. The commission's order was a ruling on a pending petition, and the commission was not stripped of its jurisdiction because this ruling was based on the legal conclusion that *NIPSCO* controlled the outcome of the controversy at hand nor because the rights of Wabash's creditors would be affected by its decision.

II. *The commission did not abuse its discretion by dismissing Wabash's petition on the merits rather than for lack of prosecution.*

REA and CFC argued that since Wabash's petition could have been dismissed procedurally for failure to prosecute under 170 I.A.C. 1-1-21, the commission committed error when it dismissed the petition on its merits. The cited provision gives the commission the discretion to dismiss a petition for failure to prosecute if there has been no activity on the petition for six months and after notice has been given to the parties that the dismissal will occur. Wabash requested and was granted a stay in the proceedings pending the decision of this Court in *NIPSCO*. The commission did not exercise its discretion to dismiss for failure to prosecute and did not give the requisite notice of dismissal. In light of Wabash's request and the determinative impact that *NIPSCO* had on the case at hand, the commission did not err in dismissing Wabash's petition on its merits.

III. *The commission did not err in concluding that Wabash was not entitled to the rate relief it requested.*

This Court held in *NIPSCO* that an investor-owned utility cannot implement a rate increase to recover costs associated with a facility which was never used or useful in the production of energy. This holding is applicable to and determinative of the issue at hand, appellants' efforts to distinguish their situation from that in *NIPSCO* notwithstanding.

A.

REA and CFC sought to distinguish this case from *NIPSCO* on the basis that the ratepayers here were the owners, and therefore the risk-bearers, of the utility. In *NIPSCO,* the utility was investor-owned, and the ratepayers were simply customers paying for service, not investors seeking returns. Appellants contend that, as members of a cooperative association, the ratepayers here were not merely customers, but had invested in the utility and were therefore subject to the risk of loss inherent in any investment activity.

In support of their view, appellants advanced as persuasive authority case law from other jurisdictions in which the courts stated that members of electrical cooperatives were both customers and stockholders of the utility. However, the question presented here, who must bear the risk of loss for a cancelled nuclear power project, is clearly distinguishable from the issues presented in those cases, whether cooperative members are competent to sit on a jury in a trial where the utility is one of the parties and whether a utility has the power of emi-

nent domain. The cases cited by appellants have no applicability, and therefore no persuasive effect, here.

Appellants also advanced a statement made by the commission in an unrelated case, *In re Hoosier Energy Rural Elec. Coop., Inc.* (August 12, 1987 Cause No. 38315), and a quotation from an interim order issued by the commission in this case as evidence that the Wabash ratepayers were investors and should be held subject to risk of loss for the failed Marble Hill project. In *Hoosier Energy*, the commission discussed the financial responsibility of cooperative membership, but the resolution of the case turned on principles unrelated to the "used and useful" standard and is wholly inapplicable here. In an interim order issued in this case, the commission noted that the application of *NIPSCO* to the facts at hand would have the apparent result that no one would be responsible for the debts incurred by Wabash. Wabash, of course, remains responsible for its debts; the question becomes whether it will be able to pay or be forced into bankruptcy like other insolvent debtors, a question which the commission could not, and did not, decide. The commission's powers and duties are to determine the propriety of requested rate increases, not to allocate the responsibility for payment of a utility's debts, and the commission appropriately refrained from issuing a finding that would purport to fix that responsibility. The comment from the commission's interim order cited by appellants provides no basis for imposing on Wabash's ratepayers the obligation to repay Wabash's debts.

The appellants argued that language from *NIPSCO* which shielded the ratepayers in that case from liability for the failed Bailly N-1 project at issue there provided

a basis for subjecting Wabash's ratepayers to liability for the failed Marble Hill project here. We stated in *NIPSCO* that it was inconceivable that

> consumers could be required to replenish lost capital which had never become "used or useful" property or, in other words, be required to act in aid and support of the utility as an insurer of the investor's risk, unless consumers received an interest in return which provided an opportunity to earn a return on the capital supplied.

NIPSCO, 485 N.E.2d at 615. The risk of loss for a utility's nuclear power generation project is to be borne by its investors to the extent of their investment. The *NIPSCO* ratepayers were insulated from liability for the Bailly N-1 debts because they were purely consumers of the utility. Appellants contended that the Wabash ratepayers were not purely consumers, but were investors who received "an interest . . . which provided an opportunity to earn a return on the capital supplied" for monies paid into the cooperative and who were subject to risk of loss on their investment.

Cooperatively-owned utilities were created to provide low cost electricity to rural areas which investor-owned utilities found impracticable to service. Stockholders in such a utility are required to "invest" a set amount, termed a membership fee, in order to receive service, and they are refunded any payments made in excess of the charge for service actually received. Appellants made the incorrect assertion that this return of overpayment is the same as a return on an investment, thereby making the cooperative members investors in the utility. The refund of an overcharge is in no way analogous to the payment of a dividend. Further, unlike the stockholder in an in-

vestor-owned utility, these "investors" have no choice as to whether or how much to invest, and the terms of Wabash's articles of incorporation provide that patrons or owners are not to furnish capital to finance utility plants nor are they to recover profits from utility operations, thus precluding meaningful participation in the utility as investors. Finally, allowing a cooperatively-owned utility to generate funds to repay debts incurred in pursuit of a failed nuclear power plant by way of a rate increase would produce the intolerable result of subjecting its "stockholders" to unlimited liability for investment decisions into which they had no input and from which they had no recourse in the marketplace.

Case law from other jurisdictions, statements by the commission in this and other cases, and the language of this Court in *NIPSCO* provide no basis for appellants' assertion that our holding from *NIPSCO* is inapplicable to the controversy at hand.

B.

Appellants next contended that differences in rate-making methodology between investor-owned and cooperatively-owned utilities[2] precluded the application of *NIPSCO* to this case and cited I.C. 8-1-13-17 in support of this proposition. That section, as in effect at the time

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[2] Rates of investor-owned utilities are based on rate of return principles; rates of cooperatively-owned utilities are based on principles of revenue requirements.

of the commission's order,[3] provided in pertinent part:

> A reasonable and just charge for service . . . shall be such charges as shall produce sufficient revenue to pay all legal and other necessary expense incident to the operation of the system, to include . . . interest charges on bonds or other obligations [and] to provide a sinking fund for the liquidation of bonds or other evidences of debt . . . . Any rate too low to meet the foregoing requirements shall be unlawful.

Appellants argued that under this section, any rate which is set so low that a cooperatively-owned utility is unable to pay its debts is unlawful. Their argument, however, failed to consider the statutory definitions of "service" and "system," two key terms which give the above-cited provision its meaning. A utility may impose a charge on its ratepayers only for service, which is defined as "the furnishing of energy, and the rendering of engineering, financial, accounting, or educational services incidental to the production, transmission, or use of energy." I.C. 8-1-13-3(m). Further, the rate a utility charges for the service provided to its ratepayers may include the expenses incurred in the operation of its system, which is defined as "any plant, works, system, facilities, or properties . . . used or useful in the generation, production, transmission, or distribution of energy." I.C. 8-1-13-3(e). Marble Hill provided no energy to Wabash's ratepayers; therefore, any charge purportedly imposed for service would have been inappropriate here. Like-

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[3] An amended version of I.C. 8-1-13-17 went into effect subsequent to the dismissal of Wabash's petition. The provisions of the amended statute are not applicable here.

wise, Marble Hill never became "used or useful" in the production of energy; therefore, none of the operation expenses associated with the project were properly chargeable to the Wabash ratepayers.

A utility's rates must be based on service regardless of method employed by the utility to set them. The distinction between rate-of-return ratemaking and revenue-requirement ratemaking is irrelevant in the context of recovering from ratepayers the costs associated with a facility which was abandoned before becoming used or useful. Appellants' argument that *NIPSCO* does not control the outcome of this case based on this distinction was without merit.

C.

Appellants argued that *NIPSCO* was distinguishable from this case because Wabash received the commission's approval to borrow funds for the Marble Hill project, thereby coming under I.C. 8-1-8.5-5.5, which allows a utility, under specified circumstances, to recover the costs associated with a cancelled facility through a rate increase. Appellants, however, are precluded from claiming entitlement to the statute's protections because they waived the issue by not raising it before the commission. Even in the absence of waiver, this statute was not in effect until well after Wabash invested in the Marble Hill project; therefore, it was not applicable to the facts at hand. I.C. 8-1-8.5-5.5 requires that a commission approval certificate be obtained prior to the onset of a project's construction and that the approval be based on an assessment of consumer needs and a determination that the proposed facility will meet those needs. If changes in

circumstances subsequently warrant modification or revocation of the approval certificate, the ratepayers are properly chargeable with the costs of the facility since both the decision to undertake and the decision to abandon the project were made following a consideration of their effects on the ratepayers.

Prior to the enactment of the statute, utilities had unfettered discretion to make investment decisions, and it was therefore inappropriate to impose on the ratepayers the cost of decisions that had been entered into with no formal analysis, consideration, and determination of how those decisions would affect them. Even had the statute been in effect when Wabash initiated its Marble Hill investment, the statutory prerequisites were not met such as to trigger the availability of a rate increase to recover the costs of the failed facility. Such recovery is allowed only where the commission has analyzed the risks associated with the proposed facility, held a public hearing, issued a certificate approving the construction, then subsequently revoked or modified the certificate. The commission engaged in no risk analysis and held no public hearing, nor did it issue, much less modify or revoke, an approval certificate. Rather than approving the Marble Hill project, as appellants characterize the commission's actions, the commission approved Wabash's request to borrow the funds necessary to finance the investment project that it had decided to pursue. The decision to abandon the Marble Hill construction came from Public Service Indiana upon its determination that it was financially unable to continue the project. I.C. 8-1-8.5-5.5 does not interdict the applicability of *NIPSCO* to this case.

D.

Appellants attempted to distinguish *NIPSCO* on the basis that Wabash is insolvent, whereas *NIPSCO* was not. Our determination of who bore the risk of loss for the cancelled nuclear power facility in *NIPSCO* was not based in any way on the utility's financial stability, and appellants cited no other authority from our courts or legislature in support of this argument. Appellants relied on two commission orders which permitted a rate increase to allow utilities to avoid insolvency. Their reliance, however, is misplaced since the order granting the rate increase in both cases specifically excluded the costs of cancelled facilities from the rate base. Wabash's insolvency does not preclude the application of the holding in *NIPSCO* to the facts at hand.

E.

REA contended that the resolution of this case by the application of *NIPSCO* would be contrary to the historical basis upon which cooperatively-owned utilities were established, namely, the provision of low cost electricity to rural areas. REA noted that future loans and guarantees from REA to Indiana cooperatives, the loss of which would reduce the availability of low cost electricity in the state, may be jeopardized by such a result. Threats of future sanctions by a federal agency provide no basis for acting in contravention of statutory authority and our own precedent. At the time the Wabash loan was approved, the REA administrator knew or should have known that Wabash's requirements contracts with its members served as the security for the loan and that those contracts provided that the rates paid by the mem-

bers had to be approved by the commission, and this knowledge was or should have been factored into REA's decision to make the loan. A federal agency is no more protected from the potential for loss due to the insolvency of a debtor than is any other lender.[4] The ability of REA to exercise its discretion in making or refusing to make future loans depending on the outcome of this case may be a business reality, but it is not a justification to ignore otherwise controlling precedent.

Appellants advanced no valid argument which precludes the application of *NIPSCO* to the facts of this case.

IV. *The commission did not err in dismissing the petition without considering whether Wabash was entitled to emergency rate relief.*

Subsequent to the presentation of its case in chief to the commission, Wabash requested leave to file a supplemental or amended petition for emergency rate relief. The commission granted the request, but advised Wabash that no action would be taken on that petition until after this Court handed down its decision in *NIPSCO*. Wabash then moved for and was granted a temporary stay on its original rate increase petition, but did not file the petition for emergency rate relief, even though it had been granted leave to do so. The commission did not err in refusing to consider and rule on an

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[4] REA also advanced the proposition that a rate set by a state regulatory commission may be implicitly pre-empted by the Rural Electrification Act if the ability of the wholesale cooperative to repay its federal loan is seriously compromised, but conceded that no pre-emption question was actually before the court for consideration and determination.

issue which was never placed before it, and an appellate court will not review issues on appeal that were never before, and therefore never ruled upon, by an administrative body.

V. *The commission's dismissal of the petition did not violate Wabash's constitutional right not to have its property taken without just compensation.*

CFC contended that the commission's order violated Wabash's Fifth Amendment right not to have its property taken without just compensation. Because this issue was not raised before the commission, it was waived. We note, however, that even in the absence of waiver, it is doubtful that Wabash's creditors would have standing to raise this issue and that two courts from other jurisdictions have rejected the argument that the application of the used and useful standard for utility rates amounts to an unconstitutional taking. *See Petition of Pub. Serv. Co.* (1988), 130 N.H. 265, 539 A.2d 263; *Barasch v. Pennsylvania Pub. Util. Comm'n* (1987), 516 Pa. 142, 532 A.2d 325.

The Third District resolved the claims in this appeal in a correct manner and correctly affirmed the commission's decision. Accordingly this Court does now, pursuant to Indiana Rule of Appellate Procedure 11, order that the opinion of the Third District not be vacated or held for naught, but instead that it be and now hereby is in all respects summarily affirmed.

Summary affirmance ordered.

PIVARNIK and DICKSON, JJ., concur.

SHEPARD, C.J., dissents with opinion.

GIVAN, J., dissents. I dissent. I stand on my dissents in *Citizens Action Coal. v. No. Ind. Pub. Serv.* (1985), Ind., 485 N.E.2d 610 and *N. Ind. Pub. Serv. v. Citizens Act. Coal.* (1989), Ind., 548 N.E.2d 153.

SHEPARD, Chief Justice, dissenting.

I agree with the majority's conclusions about most of the statutory and procedural issues presented by this appeal. I do not agree, however, that the constitutional issues presented by the federal parties have been waived. Moreover, I think that these issues cannot really be resolved by issuing a simple dismissal of Wabash Valley's petition in reliance on *Citizens Action Coalition v. Northern Indiana Public Service Co.* (1985), Ind., 485 N.E.2d 610. Accordingly, I think the dismissal was erroneous.

The Utility Consumer Counselor claimed in his brief before the Court of Appeals that these issues had not been presented to the Commission. Brief of Office of the Utility Consumer Counselor at 23-24. I am satisfied that National Rural Electric adequately, though barely, preserved the constitutional questions when it resisted the Consumer Counselor's petition to dismiss by asserting that dismissal on statutory grounds would deprive Wabash Valley of rates adequate to survive a Fifth Amendment challenge. Brief of Intervenor National Rural Utilities, Record at 598, 606-609. It is apparent that this assertion presented only a Fifth Amendment takings claim and not a Fourteenth Amendment due process claim. *See generally* Shepard, *Land Use Regulation in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 Cath.U.L.Rev. 847 (1989).

The parties' debate about waiver before this Court is somewhat different than it was before the Court of Appeals. National Rural Electric seeks transfer on grounds that the Court of Appeals wrongly found waiver. The Consumer Counselor and Wabash Valley Power have both chosen not to respond to this grounds for transfer. Their decision does not operate to concede the issue, but it does yield the field to National Rural Electric.

The merits of the constitutional issues cannot be adequately addressed through a motion to dismiss based on our *NIPSCO* opinion. As Justice Rehnquist has written, judicial determinations of Fifth Amendment takings claims are "essentially ad hoc, factual inquiries." *Kaiser Aetna v. United States,* 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332, 343 (1979). Adjudication of a claim that a regulatory scheme takes a party's property without due compensation in violation of the Fifth Amendment must necessarily be based upon a full evidentiary hearing. *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981).

The rate proceeding initiated by Wabash Valley Power was suspended awaiting this Court's decision in the *NIPSCO* case. It was dismissed promptly afterwards, so there was never developed the sort of full factual record upon which the federal parties' constitutional claims could be adequately addressed. I think these parties are thus entitled to have these claims heard rather than dismissed.

My colleagues express "doubt" that the federal parties have standing to raise these questions when Wabash Valley Power does not do so. The majority does appear to recognize that because the Court rules against the fed-

eral parties on grounds of waiver, such "doubt" is not a part of the holding of today's decision. Equally entitled to speculate, I suggest that the creditors are dealing with a debtor which has little interest in seeking rates adequate to pay off. The creditors are in a posture reminiscent of the party who must call a hostile witness in order to prove his case but cannot get much cooperation on the witness stand. In circumstances like that we grant a party the right to lead the witness. I would be inclined to afford the creditors in this litigation the opportunity to present issues the debtor seems uninterested in pursuing.

APPENDIX B

WABASH VALLEY POWER ASSOCIATION, INC.,
Plaintiff-Appellee
and
State Of Michigan And Michigan Public Service Commission, Intervening
Appellees,
v.
RURAL ELECTRIFICATION ADMINISTRATION, Defendant-Appellant.

No. 89-2482

United States Court Of Appeals,
Seventh Circuit

Argued April 3, 1990.

Decided May 23, 1990.

As Modified Aug. 22, 1990.

Before WOOD, Jr., EASTERBROOK, and MANION, Circuit Judges.

EASTERBROOK, Circuit Judge

Rate regulation for electricity rests on the theory that generating stations and transmission lines are natural monopolies. Unless constrained, suppliers charge monopoly prices in order to satisfy their investors. States hold electric utilities to the cost of service (including a competitive rate of return on invested capital); the Federal Energy Regulatory Commission does the same for whole-

sale electricity transmitted across state borders, preempting state regulation. 16 U.S.C. § 824(b); *FPC v. Southern California Edison Co.*, 376 U.S. 205, 84 S.Ct. 644, 11 L.Ed.2d 638 (1964). When the electric utility is owned by its customers, however, there is no reason to think that the seller will charge a monopoly price—or that if it does the customers will care. If the firm charges a monopoly price, the profits return to the customers as dividends, deferred rebates on the purchase price.

The natural-monopoly explanation for regulation of investor-owned utilities has been challenged. E.g., George J. Stigler & Claire Friedland, *What Can Regulators Regulate?: The Case of Electricity,* 5 J.L. & Econ. 1 (1962), reprinted in Stigler, *The Citizen and the State* 61 (1975); see also Paul L. Joskow & Richard Schmalensee, *Markets for Power: An Analysis of Electrical Utility Deregulation* (1983). For customer-owned utilities there is no equivalent debate: either way, the customers win. Most states accordingly do not regulate the prices charged by these firms. When the federal Rural Electrification Administration lends money to a utility—which it does at bargain rates for customer-owned firms—the Federal Energy Regulatory Commission drops its own system of price control, believing that customers of such firms don't need "protection" from their own managers' decisions. *Dairyland Power Cooperative*, 37 F.P.C. 12 (1967). See also *Salt River Project Agricultural Improvement & Power District v. FPC,* 391 F.2d 470 (D.C.Cir. 1968).

Yet 11 states do regulate the prices charged by cooperative electric utilities. *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1983), holds that

neither the hands-off attitude of the FERC nor any generally-applicable rule established by the REA preempts state regulation. Why might states choose to regulate the prices charged by customer-owned utilities? We can think of two answers, both of which start from the premise that the equity investors (shareholders, members) of a corporation are not its sole "owners". Other persons also invest: creditors invest money in exchange for a promise interest plus repayment; employees invest specialized skills that may not be so useful at other firms. These investors obtain contractual rights. The equity investors "own" only the rights to control and profit not assigned by contract to other investors. Electric utilities commonly depend more on debt financing than on equity financing. So perhaps the "real" owners—at least the effective controllers—of an electric co-op are the debt investors, who would be tempted to raise prices past the competitive level in order to make their loans more safe or hike up the rate of interest. When creditors control the firm, they may be inclined to set a monopoly price and not rebate the profits to the equity-investor-customers. Regulation then would play the same role it does in traditional theories.

If one possibility is that regulation prevents the debt investors from exploiting the equity investors, the other possibility is that regulation enables the equity investors to exploit the debt investors. Customer-investors—residents of the state who wield political influence there—may seek regulation of "their own" utility's prices in order to depress revenues so greatly that they no longer can pay off the debt investors. They hope to emerge from bankruptcy with control of the firm and entitled to keep all future revenues for themselves. Without regulation,

the debt investors may have contractual rights to force price increases sufficient to pay the debt in full; regulation plus bankruptcy law may provide a one-two punch allowing the customer-cum-equity-investor to escape these contractual provisions yet remain in control of the utility.

Neither the customer-exploits-creditor hypothesis nor the creditor-exploits-customer hypothesis is troubling if the firm depends on a flow of fresh capital under new contracts; the need to return to capital markets frequently ensures that contractual terms are competitive, and anyone who violates commitments made then cannot be expected to be invited back. When, however, an event sufficiently large in the life of the firm or the industry occurs, it may be worth accepting the injury to one's reputation for square dealing. In this "last period", the gains from breach exceed any loss from fetters on future bargains.

I

According to the Rural Electrification Administration, the Wabash Valley Power Association has entered that last period and is doing its best to extract the value of loans the REA made. Wabash is a non-profit generation-and-transmission utility whose customers operate in Indiana, Michigan, and Ohio. Indiana and Michigan regulate the rate customer-owned electric utilities may charge for power. Over the years the REA loaned Wabash a sum that, with unpaid interest and further advances to prevent other lenders from foreclosing, comes to about a billion dollars. Wabash promised the REA to set rates high enough to ensure that the principal and interest would be repaid. To make doubly sure, before

lending money the REA required Wabash to obtain state agencies' approval for its projects. On top of that, the REA takes a security interest in a co-op's assets, including its contracts with customers—contracts that require customers to take their requirements of electricity from the co-op at rates high enough to repay the loans. The REA thought that this combination of contractual devices would protect it. It has been proved wrong.

During the 1970s one of Wabash's neighbors, the for-profit Public Service Company of Indiana, decided to construct the Marble Hill nuclear generating station. Wabash purchased a 17% interest in the project. To finance its share it borrowed $480 million on the strength of the REA's guarantees. In January 1984 Public Service of Indiana abandoned construction of the Marble Hill station because costs had risen so high that further work would throw good money after bad. Wabash was out the money, and unless it raised its rates could not repay the lenders. It did not raise its rates and defaulted; the lenders exercised their rights under the REA's guarantees, compelling it to pay in Wabash's stead. The REA, pointing to its contract, instructed Wabash to file for rate increases sufficient to assure repayment. Wabash complied with transparent insincerity, making it clear to the state regulators that it would be delighted if they said no. (So the REA contends, and given the posture of this case we must take facts and inferences in the REA's favor. Because as a practical matter Wabash serves the interests of its owner-customers, this interpretation of its behavior before the state agencies is plausible.)

Public Service of Indiana applied for its own rate increase and emerged empty-handed. Until 1984 the

Indiana Utility Regulatory Commission believed that an investment prudent when made may be included in the rate base even though things turn out poorly. When Northern Indiana Public Service Co. (NIPSCO) applied for a rate increase to cover the expense of its abandoned Bailly N-1 plant, the Commission granted the request. *In re NIPSCO,* No. 36689 (Aug. 11, 1982). The court of appeals reversed, *Citizens Action Coalition v. NIPSCO*, 472 N.E. 2d 938 (2d Dist. 1984), affirmed, 485 N.E.2d 610 (Ind. 1985). Indiana's courts concluded that unless an investment is "used and useful" the utility is not entitled to a return on its investment. Public Service of Indiana eventually agreed not to include Marble Hill in its rate base. *In re Public Service Co. of Indiana,* No. 37414 (Mar. 7, 1986).

Such a limitation is the automatic result of competition, for a firm that builds a useless plant cannot charge more than its rivals who have invested astutely. If all firms overbuild, then there will be "ruinous competition" as price falls to marginal cost, and no one can recover the cost of capital investment. Risk of ruination makes capital more expensive (investors demand compensation for the chance that they will receive nothing). A risky business will have a higher normal rate of return on investment than a utility protected against failure by the exclusion of business rivals. So as *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 109 S.Ct. 609, 617-18 n. 7, 102 L.Ed.2d 646 (1989), observes, a policy of disallowing a return on a utility's unusable projects logically entails a higher rate of return on usable investments, and the Constitution may compel the adjustment. See also Richard J. Pierce, *The Regulatory Treatment of Mistakes in Retrospect: Cancelled Plants and Excess Capacity,* 132 U. Pa.L.Rev. 497, 525-32, 541-44 (1984).

Indiana allows its for-profit utilities to charge rates reflecting the greater risk created by the used-and-useful rule. *Citizens Action Coalition v. Public Service Company of Indiana, Inc.*, 552 N.E.2d 834 (3d Dist. 1990). For non-profit utilities the equation between greater risk (because of disallowing return on failed plants) with higher yield and greater assurance of recovery (by allowing a return on all investments prudent when made) with lower yield does not work. Because non-profit utilities are not supposed to make "profits" and do not have "equity investments" in the legal sense, the state does not allow investors any return on "investment". It asks instead only what the firm's "costs" are—wages, materials, and debt service. Excluding a failed project from the rate base means that debt investors get nothing.

When asking for a rate increase, Wabash contended that the used-and-useful rule should be applied only to for-profit utilities, which alone are entitled to return on investment. Moreover, it contended (on instructions from the REA), in a co-op the members are risk-bearers in the same sense as the investors in a for-profit firm. Consequences of mistaken decisions come home to roost in for-profit firms in lower returns on investment; for non-profits, the penalty should be visited through higher rates. The United States intervened in the administrative proceedings to drive home this contention that non-profit utilities should be treated differently. The regulatory agency disagreed and applied the used-and-useful rule across the board. *In re Wabash Valley Power Association, Inc.*, No. 37472 (Jan. 14, 1987). Wabash did not seek judicial review, but the United States did, joined by the National Rural Utilities Cooperative Finance Corporation (CFC). Both the appellate court, *CFC v. Public*

Service Commission of Indiana, 528 N.E.2d 95 (Ind. App. 3d Dist. 1988), and the Supreme Court of Indiana, 552 N.E.2d 23 (1990), agreed, the latter in a 3-2 decision. The majority reasoned that because co-ops were established to "provide low cost electricity to rural areas", rates should not be allowed to rise even when the owner-members are responsible for the costly blunder, *id.* at 27. Because "[a] utility may impose a charge on its ratepayers only for service", and Marble Hill provides none, "any charge purportedly imposed for service would have been inappropriate here." *Id.* at 28.

Shortly after the court of appeals rendered its decision, the REA took matters into its own hands. On November 23, 1988, the acting administrator of the REA sent Wabash a letter (copies to regulatory officials in Indiana and Michigan) asserting federal control over Wabash's rates:

> By this letter, we notify you that the REA hereby exercises jurisdiction over the rates charged by Wabash. Thus, the Indiana Commission and the Michigan Commission are no longer entitled to serve as regulatory authorities whose approval must be obtained for changes in Wabash's rates. The Commissions may retain the right to exercise jurisdiction over matters unrelated to Wabash's rates so long as Federal interests are not compromised. Wabash is hereby instructed to raise its rates 9% across the board immediately upon occurrence of any of the following events [all having to do with approval of the bankruptcy court]. Wabash shall, in addition, raise its rates 9% across the board on the first and second anniversary of the first occurrence of any event listed above. We believe that Wabash is capable of re-

> paying its debt, and calculate that the required rate increases are the minimum necessary. We are requiring phased-in rate increases rather than an immediate one-time increase to enable Wabash and its members to adjust to the higher rate level. . . . We will notify you of any different or additional rate increases to be implemented, either as part of a plan of reorganization [in bankruptcy] or otherwise.

Wabash did not put the rate increases into effect or ask the bankruptcy court for permission to do so. Instead it filed this suit, seeking a declaratory judgment that the REA lacks authority to preempt state law and exercise direct control over its rates. Michigan intervened to support Wabash; Indiana has filed papers as *amicus curiae* backing Wabash's views.

The district court granted Wabash's motion for summary judgment. 713 F.Supp. 1260 (S.D.Ind. 1989). It concluded that because formal published policies of the REA defer to state regulation, its letter to Wabash is ineffectual. *Id.* at 1266-67. Although *Arkansas* held open the possibility that state laws preventing the REA from recovering its loans might be preempted, the district court concluded that the REA's failure to argue preemption in the state litigation forecloses it from raising the subject in a separate suit. *Id.* at 1267-69.

II

Although none of the parties has raised the question, our initial inquiry concerns federal jurisdiction. Wabash, a debtor in bankruptcy, has been told to raise its rates. The REA believes that the additional revenues will enable it to pay all of its debts and emerge prosperous.

By contrast, the plan of reorganization proposed by Wabash's members, based on the assumption that Wabash will not raise its rates, proposes to pay only about 50% of the debt to the REA, the senior secured lender. Junior creditors would get nothing, given the absolute priority rule of 11 U.S.C. § 1129(b)(2)(A). Wabash has filed this suit for the purpose of opposing the receipt of additional income. We can see why Wabash's members oppose a rate increase, but they did not sue. Wabash itself appears to be better off as a result of the REA's directive. Where is the injury in fact sufficient to create a case or controversy under Article III of the Constitution? See *Love Church v. Evanston*, 896 F.2d 1082, 1084-85 (7th Cir. 1990).

Wabash is operating as a debtor in possession. A debtor in bankruptcy is supposed to maximize the value of the estate, which opposition to a rate increase does not. This suit serves the interests of Wabash's members at the expense of the interests of Wabash's creditors. We are surprised that the bankruptcy judge has allowed Wabash to operate as debtor in possession, when the clash of interests between creditors and its current management is so obvious. Nonetheless, the REA has not asked for the appointment of a trustee, see 11 U.S.C. § 1104(a). Because the bankruptcy court has allowed Wabash to prosecute this action (no one asked the court to block the suit), we ask only whether Wabash can establish injury in fact.

Wabash argues that it may suffer two injuries. First, if it charges the rates the REA demands, state regulatory officials may require it to disgorge the proceeds and pay penalties to boot. Second, rates exceeding those authorized by state law may put Wabash in violation of con-

tracts with its members requiring them to purchase their requirements of electricity from Wabash. Freed of their commitment, these members may turn elsewhere for wholesale power (if cheaper power is to be had); the loss of business may make the price increase unprofitable. Both of these sequences are speculative. We do not know the penalties that would apply if the REA's attempt to preempt state law should fail; more, unless the states require rebates at the current interest rate, it could be profitable to collect revenues now and return them later with penalties. As for the members' willingness to turn elsewhere for power: Wabash does not represent to us that its members have wholesale power available at less than Wabash's current rates plus the increase the REA demands. Still, it is possible that such power may be available in the future, and that higher rates now may lead to losses later.

Although this is thin gruel, it is no thinner than the claim in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), that but for a law limiting the damages that could be assessed against the operator of a nuclear plant, the plant would not be built and the risks of radiation would be reduced. The Court thought this sufficient to establish the standing of persons who live near the proposed plant, *id.* at 72-81, 98 S.Ct. at 2629-35, even though the effect of the law on construction was far from clear. (The law put a cap on liability, but the corporate form does that automatically. Firms could have established even tighter caps on liability by holding their plants as subsidiaries.) Wabash has a logical causal chain between the federal decision and potential injury. This gives it standing. There is injury in fact, and the injury is redressable by a favorable decision.

We say this cognizant that if injury befalls Wabash, the REA bears the cost. The REA is the residual claimant of the firm. Unless Wabash raises its rates, the REA stands to lose about half of its billion-dollar investment. If Wabash raises the rates only to find, because customers switch or states impose penalties, that the firm is even worse off, the REA bears the entire loss. Obviously the REA does not perceive much risk of these losses; it has no reason to compel Wabash to take steps that will reduce the realization on the debt. Still, just as we do not pierce the corporate veil to find standing in the interests of Wabash's members, cf. *In re Kubly*, 818 F.2d 643 (7th Cir. 1987), so we respect the corporate form rather than look straight to the interests of the REA. Wabash, and not the REA or its members, is the plaintiff. Wabash's exposure to loss as a result of a price increase is enough, if barely, to allow a decision by an Article III court.

Prudential concerns do not counsel dismissal. Behind the haze created by the corporate form and the bankruptcy proceedings, there is a substantial and justiciable dispute: who bears the loss of Marble Hill, the federal government or Wabash's members? Once we pass from the constitutional test to prudential concerns, it becomes significant that Wabash is acting as a tool of its members. Although a corporation technically does not "represent" its investors, many cases allow organizations to represent the interests of their members. See *Auto Workers v. Brock*, 477 U.S. 274, 281-88, 106 S.Ct. 2523, 2528-32, 91 L.Ed.2d 228 (1986). Moreover, if we were to throw the case out the sides would switch, and it would come back immediately. Wabash would refuse to raise its rates; the REA would file suit to compel it to do so, Wabash would stand on state law, and the legal questions would recur.

These questions must eventually be settled between these parties, and now is as good a time as any.

A second jurisdictional question is whether Congress has authorized a suit in the district court. Wabash contends that an agency's action is contrary to law. The Administrative Procedure Act authorizes declaratory judgment actions in such circumstances, see *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967), and an amendment to the APA in 1976, see 5 U.S.C. § 702, largely waives the sovereign immunity of the United States in equitable cases. *Bowen v. Massachusetts*, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988). The difficulty is the Tucker Act, 28 U.S.C. §§ 1346(a), 1491, which assigns to the Claims Court all actions seeking equitable relief based on a contract with the United States. Wabash contends that when it borrowed the money, the REA agreed to the application of state law. An effort to obtain specific performance of that promise (if the REA made it, a matter we do not discuss) belongs in the Claims Court. See *Sharp v. Weinberger*, 798 F.2d 1521, 1523-24 (D.C.Cir. 1986) (Scalia, J.).

In the district court the REA argued that Wabash's invocation of contractual rights required the district court to transfer the entire case to the Claims Court. The district court disagreed, holding that it may issue declaratory relief so long as that relief is not grounded in contract. 713 F. Supp. at 1263-64. We agree with that conclusion for the reasons the district judge gave. See also *Sharp*, 798 F.2d at 1524; *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1486 (9th Cir. 1985). Notwithstanding its recognition of jurisdictional limits, the district court dwelt on the REA's promises to Wabash. 713 F. Supp. at 1269-70. Because any effort to obtain specific perfor-

mance of a contract with the United States belongs in the Claims Court, the district judge should not have considered Wabash's contractual claims. We put these to one side and consider only whether the arguments based on the APA support the judgment of the district court.

III

Arkansas holds that as a rule states may regulate the prices charged by co-ops to which the REA has extended credit. The Court mentioned two possible exceptions:

> There may come a time when the REA changes its present policy, and announces that state rate regulation of rural power cooperatives is inconsistent with federal policy. If that were to happen, and if such a rule was valid under the Rural Electrification Act, it would of course preempt any further exercise of jurisdiction by the Arkansas PSC. . . . Moreover, even without an explicit statement by the REA, a particular rate set by the Arkansas PSC may so seriously compromise important federal interests, including the ability of the [debtor] to repay its loans, as to be implicitly preempted by the Rural Electrification Act.

461 U.S. at 388-89, 103 S.Ct. at 1914-15. The REA contends that its letter of November 1988 is a change of policy and expressly preempts state law. It also contends that the rates set by Indiana and Michigan "so seriously compromise important federal interests, including the ability of the [debtor] to repay" that they are preempted implicitly. We discuss these in turn.

A

The Supreme Court did not say that the REA may preempt state law at will. It said that if the REA were to

change its policy, and "if such a rule was valid under the Rural Electrification Act", then state law must yield. There are three questions: has the REA changed its policy?; does it have substantive authority to replace state with federal regulation?; has it exercised this authority in the proper way?

At the time the Court decided *Arkansas*, language in the REA's Bulletin 111-4 recognized that states may regulate the rates of its borrowers. The language of Bull. 111-4 on which the Court relied, 461 U.S. at 387-88, 103 S.Ct. at 1914, is still in force. The REA has not yet changed its "policy", although it has attempted to force Wabash to change its rates. The REA has not established its own ratemaking apparatus or said that rates must be left to the market. Instead it has left the general rule in place and has prescribed for Wabash a rate that has nothing to do with anything except repaying the loan. This is not the sort of express preemption *Arkansas* contemplated.

There is, moreover, substantial doubt about whether a rule preempting state regulation would be "valid under the Rural Electrification Act". Neither REA's letter to Wabash nor its brief in this court cites any provision of the statute allowing it to regulate the rates charged by its borrowers. Unless the REA has this authority, it is hard to see how it can preempt state law, given the holding of *Arkansas* that federal law does not occupy the field. REA needs a source of authority to set up a system making demands inconsistent with those of state law, so that under the Supremacy Clause the federal obligation would prevail.

Congress' assumption when it created the Rural Electrification Act in 1936 seems to have been that the REA

could protect itself by setting conditions on the extension of credit. (The opinions in *Arkansas* collect the legislative history, which we do not rehearse.) The REA may refuse to make loans unless state agencies guarantee rates high enough to allow repayment. It may refuse to approve a loan unless the customers (whose promises to buy power are the real security for the debt) guarantee the loan or authorize the REA to dictate rates. If either state or customer balks, the REA may deploy its funds elsewhere. Since Indiana's adoption of the used-and-useful standard, the REA has refused to make or guarantee new loans to co-ops in that state. The conditioning power is a big club, which can achieve (effective) preemption and more. See *Trans-Alaska Pipeline Rate Cases,* 436 U.S. 631, 98 S.Ct. 2053, 56 L.Ed.2d 591 (1978). But REA did not use this power when extending credit. It approved contracts with Wabash's customers that oblige them to pay no more than the state rate; it did not secure guarantees.

We need not decide whether the REA has statutory authority to abandon Bull. 111-4 and adopt a general system of regulation. It has issued a notice of proposed rulemaking, 55 Fed.Reg. 12194 (Apr. 2, 1990), to consider thoroughgoing substitution of federal for state regulation. It would be inappropriate to interrupt that process by deciding in advance whether the REA has statutory authority. Its effort to preempt state regulation of Wabash's rates alone founders on a mundane obstacle: it neglected to use the procedures required by the APA.

In order to preempt state authority, the REA must establish rules with the force of law. Regulations adopted after notice and comment rulemaking have this effect. *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed 2d 664

(1982) ("[f]ederal regulations have no less pre-emptive effect than federal statutes."). Yet although ratemaking is a "rule" under the APA, 5 U.S.C. § 551 (4), the REA did not follow the procedures the APA prescribed for rulemaking. It sent Wabash a letter. There was no notice, no opportunity for comment, no statement of basis, no administrative record, no publication in the Federal Register—none of the elements of rulemaking under the APA. 5 U.S.C. § 553. See *Thomas v. New York*, 802 F.2d 1443 (D.C. Cir. 1986) (Scalia, J.) (holding that a letter from the Administrator of the EPA does not have the force of law because it was not issued after notice and comment and was not published in the Federal Register). See also *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C.Cir. 1986) (Scalia, J.) (rule not published in the Federal Register is not a regulation). Cf. *Cosby v. Ward*, 843 F.2d 967, 979-81 (7th Cir. 1988).

In support of its submission that a letter may preempt state law, the REA relies exclusively on *Blum v. Bacon*, 457 U.S. 132, 140-41, 102 S.Ct. 2355, 2360-61, 72 L.Ed. 2d 728 (1982). This is a baffling citation, because the case involved several regulations, published in the Federal Register after full notice and opportunity for comment. The case did not involve an informal procedure remotely similar to the one the REA followed. We have not found any case holding that a federal agency may preempt state law without either rulemaking or adjudication. Perhaps closest to the mark is a case saying that a consent decree negotiated between an auto manufacturer and the Federal Trade Commission may preempt state regulation of the manufacturer's warranty policies. *General Motors Corp. v. Abrams*, 897 F.2d 34 (2d Cir. 1990) (holding that the decree is not inconsistent with

the state's rule). The Second Circuit did not discuss *Martin v. Wilks*, ___U.S. ___, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989), which holds that a consent decree may not foreclose the rights of non-parties. Because neither the state nor the consumers were parties to the FTC's case, it is hard to understand how the decree could blot out their claims based on state law. Whether the decree has such an effect should depend on whether it was adopted by the agency as its own policy following the procedures the APA requires; then the preemption would come from substantive rules rather than the parties' assent. See *United States v. AT & T*, 552 F.Supp. 131 (D.D.C. 1982), affirmed without opinion under the name *Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983), holding that an antitrust consent decree may preempt state law when the states have had an opportunity to intervene and their contentions have been resolved on the merits. It is unnecessary to pursue the question. There has been no consent and no rulemaking. Procedural shortcomings prevent giving this letter the force of law.

B

The other string to the REA's bow is its contention that when a state sets a rate so low that the federal advance cannot be repaid, that rate is preempted. To the extent the REA believes that states must adopt rules of law that always allow federal lenders to recoup their investments, it is mistaken. See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979). Although obligations to federal lenders are determined under federal law, see *Kimbell* and, e.g., *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 456, 62 S.Ct. 676,

679, 86 L.Ed. 956 (1942), the obligation here runs from Wabash to the REA; the REA seeks to affect relations between Wabash and its customers, not relations between Wabash and the federal government. What is more, *Kimbell* holds that the federal rule governing the relation between the United States and its borrowers will be taken from state law, provided that law is not hostile to federal interests. The REA does not suggest that Indiana has depressed Wabash's rates because the federal government is its principal lender. Wabash received the same treatment as Public Service Co. of Indiana (which does not have federal loans), and under state law the REA receives the same treatment as any other lender to Wabash. The government seeks not neutrality but preference.

Its best line of argument is based on *D'Oench*, which holds that when the federal government takes over a failed bank, the relations between the bank and its customers are governed by federal law. See also *Public Service Co. of Indiana v. Hamil*, 416 F.2d 648 (7th Cir. 1969). The REA has not taken over Wabash, so the state is not trying to regulate the federal government. Yet once the debt to the REA becomes the residual claim—the one that will be paid from any new receipts—it might make sense to say that Wabash and the REA are fused. When a borrower from the federal government is far under water, regulation of it *is* regulation of the United States.

Even this analogy may not be sufficient, however, because the argument that states may not regulate the federal government comes from intergovernmental tax immunity cases. In recent years the Court has held that states may levy taxes that as a practical matter fall on the federal treasury, provided the taxation is neutral be-

tween governmental and private payors. *Washington v. United States*, 460 U.S. 536, 103 S.Ct. 1344, 75 L.Ed.2d 264 (1983); *United States v. New Mexico,* 455 U.S. 720, 102 S. Ct. 1373, 71 L.Ed.2d 580 (1982). Neutral regulation that affects the REA's coffers may be treated similarly. After all, the REA made its loans and guarantees on the assumption that state regulation would apply. Lack of guarantees from Wabash's customers—coupled with the obvious incentives of a customer-owned borrower—may have led to an adjustment in the interest rate, which, in turn, increases the rates Wabash charges. (If there was no adjustment, people at the REA were asleep on the job.) When the risk materialized, the REA has demanded shelter of federal law *plus* the interest rate that reflected the risk created by state law. Nice cushion, if you can get it.

We need not decide whether the REA is entitled to a federal rule that protects agencies that did not protect themselves. (More realistically, a rule that protects the Treasury from federal employees who neglected to take precautions and private parties who take advantage of their omissions.) Once again, we stop short of a decision on the merits because of a procedural bar. The REA was a party to the administrative proceedings and obtained review from the state courts. It did not argue that Wabash's rates should be increased because federal law preempts the used-and-useful rule or otherwise requires the state to set rates high enough to repay the loans. Its argument was based on state law. Under 28 U.S.C. § 1738 the final decision in the REA's case blocks further litigation in federal court if a state court would deem the judgment preclusive. Principles of claim preclusion apply to the United States as to other litigants. *United States*

v. Stauffer Chemical Co., 464 U.S. 165, 104 S.Ct. 575, 78 L.Ed.2d 388 (1984); *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). So the question is whether Indiana would allow the REA, having challenged an administrative decision in state court under state law and lost, to urge in a different suit that state law is inconsistent with federal law. We think the answer is no.

Alleghany Corp. v. Haase, 896 F.2d 1046, 1049 (7th Cir. 1990), assumes a negative answer to this question under Indiana law. See also *Button v. Harden*, 814 F.2d 382 (7th Cir. 1987) (Illinois law). Indiana, like most other states, does not allow a party to split a single claim for relief. Multiple legal theories supporting relief on account of one transaction must be litigated at one go. *Fischli v. Fischli*, 1 Blackford 360, 361 (Ind. 1825); *Comparet v. Hanna*, 34 Ind. 74, 77-80 (1870); *Hammond Pure Ice & Coal Co. v. Heitman*, 221 Ind. 352, 47 N.E.2d 309 (1943). We summarized Indiana's law of preclusion in *Leal v. Krajewski*, 803 F.2d 332, 334 (7th Cir. 1986), observing that claim preclusion follows from a combination of (1) a judgment rendered by a court of competent jurisdiction, (2) on the merits, (3) in a suit between the same parties, where (4) the matter now at issue was, or could have been, decided. All four elements are present here. The REA could have raised its preemption argument in state court but withheld it.

The agency reminds us that many Indiana decisions say that only matters "within the issues" of the first case—that is, subjects on which "the same evidence will support the issues involved in both actions"—are deemed precluded. E.g., *M.R. v. Meltzer*, 487 N.E.2d 836, 841 (Ind.App. 4th Dist. 1986); *Biggs v. Marsh*, 446 N.E.2d

977, 982 (Ind.App. 3d Dist. 1983). As we understood it in *Leal*, this is another way of asking whether the two suits deal with a common occurrence. Two different legal theories in support of relief (state law in the state court, preemption in federal court) do not arise out of separate occurrences, and a party who neglects to put in the evidence that would support the withheld legal theory cannot later point to its own omission as justification for filing another suit. See *Ulrich v. Drischell*, 88 Ind. 354, 359 (1882); *Jones v. American Family Mutual Insurance Co.*, 489 N.E.2d 160, 166 (Ind.App. 2d Dist. 1986); *Moxley v. Indiana National Bank*, 443 N.E.2d 374 (Ind.App. 4th Dist. 1983). Such an approach would gut the rules of preclusion. Like today's case, *Leal* deals with a suit in state court to challenge an administrative decision on state grounds, followed by a suit in federal court contesting the decision on federal grounds. We held that Indiana would deem the federal grounds foreclosed because they had been withheld in state court, when the federal grounds supplied only a different legal rationale for relief arising out of a single occurrence. The same conclusion is appropriate here.

Anticipating that we would agree with the district court's understanding of Indiana's law, the REA tries to sidestep § 1738 on the ground that it expressly told the state court that it was reserving all federal questions for federal court. It refers us to a footnote in *Haring v. Prosise*, 462 U.S. 306, 313, n. 7, 103 S.Ct. 2368, 2373 n. 7, 76 L.Ed.2d 595 (1983), reserving the question whether preclusion would be appropriate in a case under 42 U.S.C. § 1983 in which a litigant has withheld a federal question from state court. When *Haring* was decided, a debate was under way about whether § 1738 applies in

full measure to cases under § 1983. Our case does not present that question. More to the point, *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), a case the REA does not cite, resolves adversely to it even the question left open in *Haring*. See also *Village of Bolingbrook v. Citizens Utilities Co.*, 864 F.2d 481, 485 (7th Cir. 1988). Section 1738 requires the application of state law. Indiana does not allow a party to split its claim just because it has announced distinctly to the tribunal that it is going to do so.

Echoing *United States v. Michaud*, 897 F.2d 264, 267 (7th Cir. 1990), we express concern over what seems to be an emerging pattern at the Department of Justice of citing cases while not informing the court that they are no longer authoritative or do not support the proposition. The Department cites *United States v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984), which holds that offensive non-mutual issue preclusion does not apply to the United States, while omitting *Stauffer* and *Montana*, which hold that claim preclusion applies in full force. The REA contends that because preemption is a question of federal law it is particularly appropriate for federal court, so that ordinary principles of preclusion do not apply. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985), which the REA does not mention in this part of its brief, is to the contrary. It contends that, despite § 1738, claim preclusion "is an equitable doctrine subject to equitable principles" (Br. 36), citing *Premier Electrical Construction Co. v. National Electrical Contractors Association, Inc.*, 814 F.2d 358, 364 (7th Cir. 1987), which does not support the proposition (it did not involve either

§ 1738 or claim preclusion), while ignoring *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), which rejects it. And as we have observed the government's brief relies (exclusively!) on *Blum v. Bacon* for the proposition that letters from federal administrators may preempt state law, although *Blum* involved formal regulations rather than letters. This is not a pattern to be welcomed.

One final potential limitation on preclusion. Indiana's courts rejected the REA's challenge to the administrative decision. Michigan has not had an opportunity to address the matter, and it is at least conceivable that Michigan would allow the United States to try again. Michigan would be bound to allow litigation on the question whether it, like Indiana, applies a used-and-useful rule in the first place to non-profit utilities. That subject was not and could not have been decided in the Indiana case. Would Michigan also let the REA argue that state law has been preempted? Perhaps. Section 1738 provides, however, that in federal court the preclusive force of a state judgment depends on its effect within the rendering state, rather than within some other state that has an interest in the controversy. At all events, none of the parties contends that Michigan would allow litigation of preemption in its courts following the omission in Indiana. We limit our reach to the subjects that have been presented.

* * *

Everything we can see about the incentives of Wabash's members and the operation of Indiana's law suggests that federal taxpayers have been taken to the cleaners. States that show creditors the door may expect

loans to be few and costly. The REA has stopped lending there. Other creditors will charge more. Indiana's economy will suffer. Indiana seeks to limit the damage through a 1987 law that abrogates the used-and-useful rule for new plants, and allows rates to be based on all prudent investment, provided the utility obtains the state commission's approval in advance. Ind.Code § 8-1-8.5.-1 et seq. If this works, Indiana will have transferred to the federal government and to other investors (most from out of state) the cost of its adventure in nuclear power, while keeping its industry healthy for the future. Creditors may be skeptical of Indiana's promise; at oral argument counsel for Michigan said that his state would feel free to repudiate such a promise if new legislators or regulators had a different view. Cf. *Chemical Bank v. Washington Public Power Supply Co.*, 102 Wash.2d 874, 691 P.2d 524 (1984). None of this matters today, for the REA lacks a sound legal basis on which to preempt Indiana's law. Appointment of a trustee in the bankruptcy court might have been the best recourse, but that is water under the bridge.

AFFIRMED.

APPENDIX C

WABASH VALLEY POWER ASSOCIATION, INC.,
an Indiana not-for-profit corporation,
Plaintiff-Appellee,
v.
RURAL ELECTRIFICATION
ADMINISTRATION, Defendant-Appellant.

No. 91-3673

United States Court Of Appeals,
Seventh Circuit.

Argued Sept. 10, 1992
Decided March 16, 1993

Before FLAUM and RIPPLE, Circuit Judges, and SHADUR, Senior District Judge.*

FLAUM, Circuit Judge.

The history of this appeal from a grant of summary judgment against the Rural Electrification Administration ("REA") is long and unhappy. In 1978 the REA approved $360 million in loan guarantees to the power supply cooperative Wabash Valley Power Association ("Wabash Valley") to invest in a 17-percent share of the Marble Hill nuclear power facility. The Public Service Company of Indiana owned the other 83-percent share. Subsequently, the REA committed to additional guaran-

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* The Honorable Milton I. Shadur, of the Northern District of Illinois, is sitting by designation.

tees of $588 million to Wabash Valley's Marble Hill venture, for a total of $948 million in loan guarantees. To collateralize these guarantees, the REA required Wabash Valley to enter into forty-year all requirements contracts (officially labelled wholesale power contracts) with each of its distribution cooperative members. According to the terms of these contracts, the REA agreed to be bound as third-party beneficiaries to rates "subject to the approval of the Public Service Commission of Indiana."

Because of sizable cost overruns, the Public Service Company canceled the Marble Hill nuclear power facility in January of 1984. That April, Wabash Valley requested a rate increase from the Indiana Utility Regulatory Commission ("IURC")[1] in order to repay loan monies expended on Marble Hill that the REA had guaranteed. Prior to any resolution of the rate increase by the IURC, Wabash Valley defaulted on its REA loans and filed for reorganization under Chapter 11; and the REA was left holding the multi-million-dollar bag. At the time of filing, Wabash Valley had outstanding debts to the REA totalling $671 million. Subsequently, Wabash Valley's petition to the IURC for a rate hike to cover its obligations to the REA was denied. Relying on its decision in *Citizens Action Coalition v. Northern Indiana Public Service Co.*, 485 N.E.2d 610 (Ind.1985), *cert. denied*, 476 U.S. 1137, 106 S.Ct. 2239, 90 L.Ed.2d 687 (1986), the Indiana Supreme Court reiterated that the "used or useful" rule applies to customer-owned utilities and upheld the IURC's denial of Wabash Valley's request for a rate hike. *National Rural Utilities Cooperative Finance Corp. v. Public*

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[1] The Indiana Utility Regulatory Commission was formerly the Public Service Commission of Indiana.

Service Commission of Indiana, 528 N.E.2d 95 (Ind.App. 1988), *aff'd*, 552 N.E.2d 23 (Ind.1990).

Having failed to recoup in state court the monies extended to Wabash Valley, the REA asserted jurisdiction over ratemaking by means of a preemption letter to Wabash Valley and the IURC. The REA's letter instructed Wabash Valley to raise its rates immediately and detailed a rate schedule. We found the REA's preemption letter to be invalid because it did not comply with the notice and comment requirements of the Administrative Procedure Act. *Wabash Valley Power Association v. Rural Electrification Administration,* 903 F.2d 445 (7th Cir. 1990) ("*Wabash I*"). At the federal court level, the REA also raised the possibility of implied preemption for the first time. We held that principles of preclusion prevented the REA from asserting an implied preemption argument at that late stage of the litigation. *Id.* at 455.

While that case was still pending before this court, the REA published a notice of proposed rulemaking. 55 Fed. Reg. 12194-12202 (April 2, 1990). After the notice and comment period, the REA promulgated two new preemption regulations. 55 Fed.Reg. 38638-38654 (September 19, 1990). The first rule, concerning preemption for inadequate rates, reads in pertinent part:

> (a) State regulatory authority jurisdiction over a power supply borrower's rates shall be preempted by the RE Act if the Administrator shall have determined that the borrower's rates approved by the state regulatory authority are, after taking into account the borrower's costs and expenses, inadequate to produce revenues sufficient to permit the borrower to make required payments on its secured loans and the borrower has failed to make required payments on its secured loans.

7 C.F.R. § 1717.305 (1991). The second rule, concerning borrowers in bankruptcy, provides:

> State Regulatory Authority jurisdiction over an REA borrower's rates shall be pre-empted by the RE Act and REA shall have exclusive jurisdiction over the borrower's rates:
>
> (a) On October 19, 1990, with respect to any borrower by or against whom a case under the Bankruptcy Code of 1978, as amended, was commenced prior to and remains outstanding on October 19, 1990; and
>
> (b) With respect to all other borrowers, upon the filing of a petition by or against the borrower commencing a case under the Bankruptcy Code of 1978, as amended.

7 C.F.R. § 1717.354 (1991). Stripped of their semantic trappings, both the preemption regulations and the bankruptcy regulations are rules designed to shift the risk of default on REA loans from the REA to cooperative members. After the REA promulgated these rules, Wabash Valley brought suit in federal court for a declaratory judgment to prevent their enforcement. The district court held the rules to be invalid. We affirm.

I.

As a federal credit program, the REA promotes and facilitates investment in electricity (and telephones, to a lesser extent) for rural areas in order to ensure that these regions receive power at reasonable prices. *See* Congressional Budget Office, *New Approaches to the Budgetary Treatment of Federal Credit Assistance* (1984); M. Weidenbaum & R. Harnish, *Government Credit Subsidies for Energy Development* (1976). It has traditionally

performed this function by reducing the cost of funding to cooperatives, as well as other nonprofit organizations, through the provision of insured loans and loan guarantees. Until recently, the Rural Electric and Telephone Revolving Fund ("RETRF"), rather than the REA itself, advanced monies for the loans and guarantees and has borne any losses incurred under the rural electrification program.[2] The RETRF, in turn, has financed its lending from repayments of principal and interest and sales of certificates of beneficial ownership to the Federal Financing Bank ("FFB").[3]

When offered at the government's cost of borrowing, loans made by the REA subsidize rural power. The interest rate the government has to pay for money is only the return on a risk-free investment. Without federal assistance, REA borrowers would have to pay a higher rate of interest to obtain insured or guaranteed loans because of the non-zero risk involved. The difference between the government's rate of interest and the rate the borrower would have otherwise had to pay is the subsidy; the cost to the government is the risk of default. In private credit

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[2] Under the Federal Credit Reform Act of 1990, the REA Revolving Fund was phased out and replaced by a Liquidating Account covering loans made before October 1, 1991. In addition, a Financing Account was established to cover funds advanced after October 1, 1991. *See* 2 U.S.C. § 661 (Supp.1992).

[3] Insured loans, which constitute a small percentage of REA credit activity, are made at a 5 percent interest rate. The lion's share of REA credit consists of loan guarantees, almost always made by the FFB, at an interest rate "not more than the rate of interest applicable to other similar loans then being made or purchases by the [FFB]." 7 U.S.C. §§ 935-36 (Supp.1992). This rate is equal to the Treasury's borrowing rate plus one-eighth of a percentage point. App. Brief at 4 n. 1.

markets, interest rates and guarantee fees incorporate a risk premium.[4] This premium both induces lenders to bear the risk of default and assures that, on average, payments by borrowers are sufficient to cover default losses. In government lending, default risk exists in at least equal measure. The cost of this risk, which is borne by taxpayers without direct compensation, is the fee that would be required to induce a lender to bear these risks. Consequently, when the guarantee program of the Rural Electrification Act, 7 U.S.C. § 901 *et seq.* (1980 & Supp. 1992) ("RE Act"), requires all REA borrowers to pay a rate of interest only marginally higher than the government's cost of borrowing (.125% higher), the rate paid by REA borrowers is substantially lower than on long-term borrowing by companies seeking credit in private markets.

Both of the current loan mechanisms of the REA reflect these subsidies. REA-insured loans contain a hidden interest subsidy representing the difference between the interest rate the borrower would obtain without REA assistance and the interest rate the government must pay for money. Moreover, the insured loans contain an explicit subsidy if the government is making insured loans at interest rates below its cost of borrowing. REA-guaranteed loans also provide both a subsidy to borrowers in the form of interest rate savings and a cost to the government in the form of risk.[5] When the chance of

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[4] The Rural Electrification Act prohibits the REA from charging a guarantee fee. 7 U.S.C. § 936 (1980).

[5] Further evidence of a policy of subsidizing rural electrification is found in the statutory provision affording the REA the

(continued...)

default by the firm is high, a guarantee can have substantial value on a large loan.[6]

Furthermore, all REA loans contain a more latent subsidy which is reflected in the amount of leverage that the REA allows its borrowers.[7] Loans to cooperatives repre-

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[5] (...continued)
discretion to lengthen the repayment period of loans and to subordinate the government's lien position in the event of default by a REA-financed cooperative. 7 U.S.C. §§ 912, 934 (1980 & Supp.1992). The existence and duration of these subsidies strongly indicate that Congress has recognized the need for the federal government to absorb some of the costs of rural electrification.

[6] The present value of a loan guarantee is the amount lenders would be willing to pay today to relieve themselves of all risk of default on an otherwise equivalent unguaranteed loan. R. Brealey and S. Myers, *Principles of Corporate Finance* 567 (1988).

[7] The favorable treatment accorded to power supply borrowers would appear to impede one of the basic goals of REA assistance—functioning without it. In a 1973 amendment to the RE Act, Congress urged that cooperatives "be encouraged and assisted to develop their resources and ability to achieve the financial strength needed to enable them to satisfy their credit needs from their own financial organizations and other sources at reasonable rates and terms consistent with the loan applicant's ability to pay and the achievement of the Act's objectives." 7 U.S.C. § 930. However, the very structure that Congress adopted undermines the ability of cooperatives to develop other sources of financing. The extremely high leverage of power supply cooperatives makes fixed payment debt issued by such cooperatives very risky for creditors, which would lead to unusually high interest rates on that debt. *See* J. Van Horne, *Financial Management and Policy* 506 (1989). At the same time, the nonprofit status of these cooperatives prohibits them from soliciting private equity capital in order to improve their capital structure. Moreover, the policy of keeping capital
(continued...)

sent the entire investment in their property, whereas private companies must finance a large part of their investment through more costly classes of securities rather than bonds. The more leveraged a firm is, the higher the required return on the debt will be in order to attract capital. Therefore, the more leveraged the position of a rural electric cooperative, the lower the interest rate it is charged in proportion to what the market would charge.

In an world unconstrained by the RE Act, the risk in a project of the scope of Marble Hill—in conjunction with the obvious incentives of a customer-owned borrower such as Wabash Valley to charge low rates—should lead the REA to adjust the interest rate charged, which would, in turn, increase the rates Wabash Valley would charge its customers. However, the RE Act allocates to the REA and its Administrator only limited authority for effectuating the goals of the RE Act. As a consequence, the REA is obliged to rely on its financing documents—the wholesale power contract, the loan contract, and the security instrument—to condition repayment and thereby protect itself.

II.

As we indicated in our previous decision, customer-owned utilities can function as self-regulating entities because they have no incentive to charge excessive rates for the electricity they sell. *Wabash I*, 903 F.2d at 447. Therefore, REA-financed cooperatives do not require pro-

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[7] (...continued)
contributions by distribution cooperative members to a minimum forecloses another avenue of improving their capital structure.

tection against their own managers' decisions. Despite the incentives provided by the structure and operation of the RE Act, however, borrowers do not have unfettered discretion. The REA itself exercises control over all of its borrowers through the imposition of contractual requirements (and not through the explicit regulation of electricity rates). In addition, eleven states also regulate prices charged by their cooperative electric utilities. In these states the REA makes its loans and guarantees with the knowledge that state regulation applies.[8]

The relationship among the power supply cooperatives, distribution cooperatives, and the REA is structured through the wholesale power contract. This contract obligates a distribution cooperative to purchase all of its electric power over a fixed term (in this instance, forty years) from a power supply cooperative. When lending money to the power supply cooperatives, the REA requires that they enter into wholesale power contracts with member distribution cooperatives. (Likewise, when entering into such relationships with distribution cooperatives, the REA requires those distribution cooperatives to enter into similar contracts with power supply cooperatives.) This arrangement ensures that power supply borrowers will be able to earn revenue from the sale of

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[8] For example, the language of Wabash Valley's mortgage agreement repeats the more general language of standard REA mortgages, which provide that cooperative rates would be "subject to applicable laws and rules and orders of regulatory bodies." According to *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 388, 103 S.Ct. 1905, 1914, 76 L.Ed.2d 1 (1983), "any reference in an REA document to a 'regulatory commission' could only mean a state regulatory agency."

power sufficient to meet their costs. One level of protection is the security interest the REA takes in the physical assets of both types of cooperatives as well as in the respective rights and interests of each party under the wholesale power contracts.

In addition to taking a security interest in the assets of the power supply cooperative, including the wholesale power contracts, the REA requires a power supply borrower, such as Wabash Valley, to obtain the approval of state regulatory agencies for its investment projects before lending any money. Within this system of supervision, the wholesale power contracts themselves constitute the lynchpin of the REA lending program. A state regulatory agency that sets cooperative utility rates too low would frustrate the effectiveness of the wholesale power contracts. As a result, the REA contends that ratemaking by state regulatory agencies which seriously compromises the ability of REA borrowers to make required payments is subject to preemption.

A.

When the federal government acts within its constitutional authority, it is empowered to preempt state laws to the extent it believes such action to be necessary to achieve its purposes. The Supremacy Clause of the Constitution authorizes this federal action, and the phrase "Laws of the United States" of Article IV encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization. For this reason, the Supreme Court has not only established a number of ways in which Congress can be understood to have preempted state law, *see*

Louisiana Public Service Comm'n v. F.C.C., 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898-99, 90 L.Ed.2d 369 (1986), but the Court has also recognized that "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *Id.* at 369, 106 S.Ct. at 1898-99.

In order for the REA to enforce its preemption regulations, it must overcome two significant obstacles. The first hurdle is the longstanding presumption against preemption of an area traditionally subject to state regulation. *See California v. ARC American Corp.*, 490 U.S. 93, 100, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86 (1989). When regulation is of a field traditionally occupied by the states, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 231, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). The same principle applies when an agency acts to preempt the field. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715, 105 S.Ct. 2371, 2376, 85 L.Ed.2d 714 (1985). More than fifty years of state regulation of cooperative utility rates (in those states that have continued to regulate these rates) since the enactment of the RE Act certainly reflects the fact that Congress has not occupied the field. Therefore, the REA must demonstrate a conflict between state regulation of cooperatives and the federal rural electrification program that is strong enough to overcome the presumption that state ratemaking can constitutionally coexist with the federal financing regime.

The second obstacle in the REA's path is the scope of the agency's authority in rulemaking. Legal authoriza-

tion for preemptive federal regulations follows from two fundamental precepts. "First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *Louisiana Public Service Comm'n*, 476 U.S. at 374, 106 S.Ct. at 1901. Under the very deferential standard of review enunciated by the Supreme Court, our inquiry is whether a federal agency has properly exercised its own delegated authority rather than simply whether Congress has properly exercised its legislative power. Thus, in determining when state law is pre-empted by federal regulation, a "narrow focus on Congress' intent to supersede state law [is] misdirected" because "[a] preemptive regulation's force does not depend on express congressional authorization to displace state law." *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 154, 102 S.Ct. 3014, 3023, 73 L.Ed.2d 664 (1982). If authorized by statute, the regulations of an agency will preempt state law that conflicts with such regulations or frustrates the purpose of those regulations. *City of New York v. F.C.C.*, 486 U.S. 57, 64, 108 S.Ct. 1637, 1642, 100 L.Ed.2d 48 (1988); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984).

B.

Much of the discussion—and disagreement—over the REA's authority to preempt turns on the single Supreme

Court decision in this area. *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n,* 461 U.S. 375, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1983), established that, as a rule, states may regulate electricity prices charged by cooperatives that have received credit from the REA. However, the Supreme Court identified two potential exceptions:

> There may come a time when the REA changes its present policy, and announces that state rate regulation of rural power cooperatives is inconsistent with federal policy. If that were to happen, and if such a rule was valid under the Rural Electrification Act, it would of course preempt any further exercise of jurisdiction by the [state regulatory authority] . . . . Moreover, even without an explicit statement by the REA, a particular rate set by the [state regulatory authority] may so seriously compromise important federal interests, including the ability of the [cooperative] to repay its loans, as to be implicitly preempted by the Rural Electrification Act.

Id. at 388-89, 103 S.Ct. 1915. Earlier in this protracted litigation, the REA forwent the chance to press the second exception, which may have been its strongest argument. When originally proceeding in Indiana to recover its investment, the REA, for reasons that are not clear to us, did not raise the possibility of implied preemption. Having failed to raise the implied preemption argument in the administrative and judicial proceedings in Indiana, the REA was prevented by principles of preclusion from attempting to do so in federal court. *Wabash I,* 903 F.2d at 455. When this avenue was foreclosed in the previous litigation, the REA enacted the two new

regulations.[9] Although the REA does not directly attempt an implied preemption argument in this appeal, the agency relies on the relevant language in *Arkansas Electric* to reinforce its assertion of statutory authority to preempt state utility regulation. In response, Wabash Valley contends that res judicata effectively prohibits the REA from relying on implied preemption, particularly if the intent of its rulemaking is to circumvent our earlier holding.

Res judicata, and its paternal twin collateral estoppel, have been the subject of widespread discussion in numerous cases. *See, e.g., United States v. Mendoza*, 464 U.S. 154, 157-59, 104 S.Ct. 568, 571, 78 L.Ed.2d 379 (1984); *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103 (1981); *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645, 649, 58 L.Ed.2d 552 (1979); *Smith v. City of Chicago*, 820 F.2d 916 (7th Cir.1987). According to the Supreme Court, res judicata prevents a party "from relitigating the same cause of action against the parties to a prior decision." *Mendoza*, 464 U.S. at 163, 104 S.Ct. at 574. More illuminating, the Fifth Circuit has elaborated that res judicata "treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same 'claim' or 'cause of action.' . . .

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[9] The concurrence regards our conclusion that the REA missed its chance to press the implied preemption argument held out by the Supreme Court in *Arkansas Electric* as silence. In fact, that language suggests a possible recourse for the REA absent specific regulatory action. Once the REA enacted the preemption regulations—its explicit statement, we naturally turn to its authority to do so.

Under these rules of claim preclusion, the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial." *Kaspar Wire Works, Inc. v. Leco Engineering & Machinery, Inc.*, 575 F.2d 530, 535-36 (5th Cir.1978).

Because this litigation originated in Indiana, its rules of preclusion determine whether res judicata bars the REA from applying its regulations to the REA. *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985); *see generally Hart and Wechsler's The Federal Courts and the Federal System*, 1627-29 (3d ed. 1988). According to Indiana law, which we summarized in *Leal v. Krajewski*, 803 F.2d 332, 334 (7th Cir.1986), claim preclusion follows from the following four factors: (1) a judgment from a court of competent jurisdiction, (2) on the merits, (3) in a suit between the same parties, in which (4) the matter at issue was, or might have been, determined in the former suit. Rather than a claim or a cause of action, therefore, we are left to decide whether there is a coincidence in the matter at issue in this and the previous litigation.

Indiana's formulation for what constitutes a matter at issue is more narrow than our federal rule, under which a single cause of action consists of " 'a core of operative facts' which give rise to a remedy," *In re Matter of Energy Cooperative, Inc.*, 814 F.2d 1226, 1230-31 (7th Cir.), *cert. denied*, 484 U.S. 928, 108 S.Ct. 294, 98 L.Ed.2d 254 (1987) (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir.1986)). For purposes of claim preclusion, "[e]very [matter] which was within the issues, and which, under the issues, might have been proved,

will be presumed to have been proved and adjudicated." *Peterson v. Culver Educational Foundation,* 402 N.E.2d 448, 460 (Ind.App.1980) (quoting *Town of Flora v. Indiana Service Corporation,* 222 Ind. 253, 53 N.E.2d 161 (1944)); *see Yellow Cab Co. v. Williams*, 583 N.E.2d 774, 777-79 (Ind.App.1991); *M.R. v. Meltzer*, 487 N.E.2d 836, 841 (Ind.App.1986); *Biggs v. Marsh*, 446 N.E.2d 977, 982 (Ind.App.1983). As we recognized in *Wabash I*, the inquiry under Indiana law is essentially whether the two suits deal with a common transaction or occurrence. 903 F.2d at 456. Under this conceptualization, a very expansive construction of Indiana's rule of res judicata might conceivably extend to the REA's attempt to apply the preemption regulations to Wabash Valley.

The procedural posture of the litigation substantially complicates this analysis. At one level, it does appear that the REA has resorted to rulemaking in order to avoid the impact of our earlier holding. The REA nevertheless maintains that its authority to expressly preempt particular state rates can be implied from the RE Act itself. Arguably, the fact that the REA has waived implied preemption with respect to Wabash Valley would militate in favor of finding that res judicata bars the application of these regulations—which are themselves derived from implied authority—to Wabash Valley. It would follow that to the extent that the REA is relying on implied preemption, our earlier decision has foreclosed any revisiting of that issue.

However, this reasoning is flawed in two important respects. First, the REA's argument is not simply one founded on the principle of implied preemption. It is asserting the implied authority to engage in preemptive rulemaking rather than the authority to impliedly pre-

empt. In this regard, the REA asserts that its regulations are compatible with the statutory responsibilities delegated by the RE Act to the Administrator of the REA. Second, the matter at issue for purposes of Indiana law are regulations that could not have been the subject of the preceding litigation because they were not in existence. While the timing and rationale of the preemption regulations may be suspect, that alone is not sufficient to bring the use of those regulations against Wabash Valley within the principles of res judicata. Such a conclusion would be an unwarranted distortion of the posture of the litigants in *Wabash I* and the Indiana rules of preclusion.[10]

III.

The fact that res judicata does not bar this suit does not relieve the REA of the need to establish the validity of the regulations themselves. According to the standard

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[10] Under the concurrence's singular notion of preclusion, the REA apparently can no longer rely on federal law to overcome Indiana's regulation of Wabash Valley's rates. This approach to claim preclusion lavishes attention on the potential outcome of the REA's actions at the expense of identifying the *claim*—in the sense of the cause of action. In defining the scope of claim preclusion (and not issue preclusion, which is irrelevant to a subsequent suit between the parties to an earlier action), our ultimate source is the Indiana courts. When other facts or conditions intervene, forming a new basis for a claim, claim preclusion does not apply. *Cf. South Bend Federation of Teachers v. National Education Ass'n,* 180 Ind.App. 299, 389 N.E.2d 23, 34-35 (1979). Accordingly, the issue of resorting to implied preemption was put to rest in our previous opinion. Enforcement of the preemption regulations was not. It is axiomatic that the reach of claim preclusion extends only to those theories which could have been raised in the earlier proceeding.

expressed in *Arkansas Electric*, state law would be expressly preempted if the REA were to change its policy and "if such a rule were valid under the Rural Electrification Act." 461 U.S. at 389, 103 S.Ct. at 1915. Prior to the enactment of these regulations, the published policy of the REA required borrowers to "submit proposed rate changes to any regulatory commissions having jurisdiction and [to] seek approval in the manner prescribed by those commissions." REA Bulletin 111-4 at 1-2 (1972) (quoted in *Arkansas Electric,* 461 U.S. at 387, 103 S.Ct. at 1914). Preemption of state regulatory jurisdiction would have been wholly inconsistent with the REA's own guidelines. The new preemption regulations—which apply not only to Wabash Valley but to all REA-financed cooperatives—manifests a change in policy. While not denying states the authority to regulate rates charged by cooperatives, the REA has attempted to carve out specific exceptions to this general rule. 7 C.F.R. §§ 1717.300-310, 1717.350-356 (1991). Our principal inquiry, therefore, is whether Congress intended for the REA to exercise such preemption power.[11]

A.

Because Congress has not occupied the field, the REA must establish some other statutory basis for the new regulations. To this end, the REA argues that the fun-

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[11] A subsidiary consideration is whether the REA has lawfully exercised properly delegated power. Provided that statutory authorization exists, regulations adopted pursuant to notice and comment rulemaking constitutes a lawful exercise of that power. *Batterton v. Francis*, 432 U.S. 416, 419 n. 9, 97 S.Ct. 2399, 2405 n. 9, 53 L.Ed.2d 448 (1977).

damental purpose underlying the RE Act is that loans be repaid. Authority for this assertion derives from the Act itself, which provides that loans "shall not be made unless the Administrator finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed." 7 U.S.C. § 904. If the Administrator finds that the loan "will be repaid," then the loan is authorized by statute, at the statutorily-fixed interest rate. *Id.* If the loan will not be repaid, then the REA is prohibited from making the loan.

Standard wholesale power contracts entered into by REA borrowers and distribution cooperative customers, which determine the stream of revenues, represent the principal security for an REA loan or guarantee. A borrower's revenues from its sales of electricity will constitute adequate security to ensure repayment of a loan only if the borrower is in a position to sell a sufficiently large quantity of electricity at a sufficiently high price. The REA contends that it is implausible to construe the REA's loan documents to require borrowers to design their rate structures in a manner that generates sufficient revenues to enable loan repayment, yet at the same time to empower state regulatory agencies to disapprove rates that are necessary for a borrower to generate revenues required to meet repayment schedules. 55 Fed.Reg. 38641. If state regulatory agencies can impair repayment through the imposition of inadequate rates, the argument goes, those agencies may jeopardize the viability of the rural electrification program.

In order to prevent this outcome, the REA now seeks to formalize its authority over utility rates of power supply cooperatives through its proposed rules for preempt-

ing, on an ad hoc basis, state regulation in general ratemaking and for bankruptcy proceedings. Subject to the parameters of the statute, the proposed rules would represent a valid exercise of express preemptive authority if they serve an important federal interest. According to the REA, the important federal interest at stake consists solely of the repayment of the federal loans. In reviewing the validity of these regulations, this court does utilize the deferential standard that the REA urges. *City of New York*, 486 U.S. at 64, 108 S.Ct. at 1642; *De la Cuesta*, 458 U.S. at 154, 102 S.Ct. at 3023. However, in applying this deferential standard, we must take account for two significant factors.

First, the statute itself is silent with respect to rulemaking by the REA. Unlike the cases on which the REA relies for the deferential standard of review, the RE Act itself does not contain any general delegations of discretionary power to the Administrator. *E.g., City of New York*, 486 U.S. at 67-68, 108 S.Ct. at 1643-44 (Commissioner may "[m]ake such rules and regulations and prescribe such restrictions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter") (quoting 47 U.S.C. § 303); *De la Cuesta*, 458 U.S. at 160, 102 S.Ct. at 3026 (Federal Home Loan Bank Board may issue regulations "to provide for the organization, incorporation, examination, operation, and regulation of [savings and loan] associations.") (quoting 12 U.S.C. § 1464(a)(1)); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 308-09, 99 S.Ct. 1705, 1721, 60 L.Ed.2d 208 (1979). To argue that Congress did not intend for states to frustrate the goals of the RE Act falls short of establishing a statutory basis for the REA's sweeping assumption of regulatory authority over ratemaking for

cooperatives.[12] Any authority exercisable by the REA is merely derivative of the Administrator's responsibilities for the operation of the loan and guarantee programs under the RE Act. *See, e.g., Public Utility Dist. No. 1 v. Big Bend Elec. Cooperative, Inc.*, 618 F.2d 601 (9th Cir. 1980).

Moreover, to extract a single phrase from a comprehensive legislative scheme and christen it as the defining characteristic does not comport with the spirit of the statute or its history. *See* 7 U.S.C. §§ 902, 930. Because the opinions in *Arkansas Electric* detail the legislative history of the RE Act, we will not repeat that here. *See Arkansas Electric*, 461 U.S. at 386-88, 398-401; 103 S.Ct. at 1913-14, 1920-21. Certainly, the purpose of the RE Act cannot be reduced to a single overriding concern for the welfare of the federal Treasury. Rural electrification, whether enabling electricity purchases by distribution cooperative customers or assisting the development of generation and transmission facilities, remains the fundamental goal of the RE Act. Continued congressional willingness to subsidize rural power development confirms this conclusion. We are not persuaded that national rules for rate regulation of rural electric cooperatives,

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[12] The wholesale power contracts underlying the REA's argument do serve to define the relationship among the power supply cooperative, the distribution cooperatives, and the REA; consequently, such a contract would allow the REA, for example, to enforce its rights as a third-party beneficiary of the revenue stream. *See Tri-State Generation & Trans. Ass'n v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1359-60 (10th Cir. 1989). However, these contracts are not so strong as to bear the weight of a system of utility regulation that the REA proposes.

administered on an ad hoc basis, is the answer to safeguard the viability of the rural electrification program itself or to protect the Treasury from defaulting borrowers. *Cf. United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 729, 99 S.Ct. 1448, 1459, 59 L.Ed.2d 711 (1979).

Second, the presumption against preemption reinforces our conclusion that nondiscriminatory state regulation which fosters legitimate state interests should not be subject to preemption in the manner that the REA now proposes. In denying the rate hike to Wabash Valley early in this litigation, the Indiana authorities acted in accordance with longstanding principles of utility rate regulation. We do not find that the federal interest in recovering its monies is sufficiently strong to upset the tradition of shared state and federal responsibility over the utility rates of REA-financed cooperatives. Although preemption regulations may be an adequate regulatory response to similar circumstances in the future, Congress has not embraced the regulatory approach in the original statute or its amendments. *Cf. Securities Industry Ass'n v. Board of Governors of Federal Reserve System,* 468 U.S. 137, 153-54, 104 S.Ct. 2979, 2988, 82 L.Ed.2d 107 (1984). This fact, as well as sustained congressional subsidization of rural electrification, indicate that the REA would need to show state action that is more drastic or even discriminatory before federal preemption is warranted. Allowing the Administrator to vitiate particular state rates set according to long-established principles of ratemaking is not compatible with this statutory scheme.

Being a lending agency administering a federal credit program rather than a regulatory agency, the REA has at its disposal means to secure repayment that are less disruptive to the recognized prerogative of states to regu-

late cooperative utility rates. *See* 55 Fed.Reg. 38641. Because interest rates on RE Act insured and guaranteed loans are fixed by statute, 7 U.S.C. §§ 935-36, the REA—unlike an ordinary commercial lender—does not have the option of making a loan at an enhanced interest rate to compensate for the perceived risk of default. Instead, the REA has the stick of its authority to lend or not to lend in a particular jurisdiction to protect against defaulting debtors. In fact, the RE Act appears to reflect an assumption by Congress when it created the Rural Electrification Administration that the REA could protect itself by setting conditions on the extension of credit.

Under the RE Act, the REA finances power-supply borrowers only with the required approvals of all state regulatory authorities. 7 U.S.C. § 904; 55 Fed.Reg. at 38654. Accordingly, if a state, in its discretion, declines to approve a proposed loan, then the RE Act does not permit the loan to be made. On the other hand, if the state gives its approval, then the loan is authorized subject to the "terms and conditions" imposed by the Administrator. 7 U.S.C. § 904. As a term or condition, the REA may refuse to make loans unless state regulatory authorities formally commit to rates high enough to allow repayment. The REA may similarly refuse to approve a loan unless the customers, whose promise to buy power are the real security for the debt, guarantee the loan or authorize the REA to oversee rates. If either the state or the cooperative customer balks, the REA may deploy its funds elsewhere.[13] Thus, the REA conditions power supply loans on

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[13] The strength of this stick should not be underestimated. After the financial difficulties with Wabash Valley, the REA

(continued...)

state commitments to set wholesale power rates high enough to enable loan repayment. The REA failed to so qualify its loan guarantees to Wabash Valley.

B.

Distilled to its essence, the REA would have Wabash Valley's subscribers absorb the losses stemming from Wabash Valley's default and the REA's mishandling of its security arrangement. While the monies disbursed through the REA are properly regarded as credit rather than grants, the tools in the REA's kit to ensure repayment are not without limits. As with any other lender, the REA assumes the business risk of advancing money to a specific organization, the risk that the organization will not be able to repay. Given the history and function of the RE Act, the scope of this risk incorporates the possibility that state regulation may occasionally impede the ability of power supply cooperatives to repay their loans. One could reasonably argue that the structure and operation of the subsidies provided through the REA reflect a congressional preference for the government's bearing this risk, rather than cooperative members. In any event, it is clear that the REA may not dictate who shall bear the risk because that would amount to the agency conferring power on itself. *Cf. Louisiana Public Service Comm'n*, 476 U.S. at 374, 106 S.Ct. at 1902. The REA has not identified a source of authority in either the express language or the purpose and operation of the RE

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[13] (...continued)
suspended its lending in Indiana. Subsequently, the Indiana legislature amended its "used or useful" standard to accommodate specifically the repayment of obligations to the REA. *See* Ind.Code Ann. § 8-1-17-20 (West Supp.1992).

Act to justify its preemption regulations. Accordingly, we cannot infer that the statute grants the Administrator the authority he seeks.

For the foregoing reasons, the decision of the district court is AFFIRMED.

SHADUR, Senior District Judge, concurring in the result.

Judge Flaum's opinion provides an admirably clear exposition of an extremely complex subject matter, especially overlaid as that subject matter is in this case by a tortuous history of repeated litigation. And the result—REA's inability to enforce its 1990 preemption regulation against Wabash Valley—is equally unexceptionable. Where I must regretfully part company with the majority is in its having gone beyond that issue to one that I believe to be unnecessary to the decision: the validity or invalidity of the preemption regulation on its face (that is, whether the regulation is potentially viable against REA borrowers other than Wabash Valley under circumstances other than the unique set of facts in this case).

Not only is that added reach of the opinion unnecessary to the resolution of the two-party controversy before us, but it also seems to me that:

> 1. Invalidation of the regulation on its face, rather than simply as sought to be applied against Wabash Valley, is at odds with the sound jurisprudential approach counseled by Justice Brandeis in his famous concurrence in another power case—*Ashwander v. TVA*, 297 U.S. 288, 346-48, 56 S.Ct. 466, 482-83, 80 L.Ed. 688 (1936).

> Even though *Ashwander* dealt with the wisdom of avoiding constitutional questions as to Congress' legislative power unless those questions had to be reached to decide the particular case, I believe that the same notion of judicial restraint should extend to our not deciding on the general power of an administrative agency to "legislate," where resolving that question is equally nonessential to the current decision.
>
> 2. Invalidation of the regulation also gives insufficient credence to one of the prospects for implied preemption specifically held out by the Supreme Court in *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 389, 103 S.Ct. 1905, 1915, 76 L.Ed.2d 1 (1983). To be sure, that statement is dictum. But just as district judges are expected to pay heed to dicta from their Courts of Appeals—at least in situations where there is no need to evaluate the force (or lack of force) of such dicta in order to decide the specific case at issue—so the basic concept of our judicial hierarchy calls for Courts of Appeals to approach Supreme Court dicta in the same gingerly fashion.

Although no extended discussion is required to explain those points of departure from the majority opinion, a brief explanation is certainly in order.

First, REA must lose this case under established principles of claim preclusion. My principal reason for generally preferring the terms "claim preclusion" and "issue preclusion" over the more traditional "res judicata" and "collateral estoppel" terminology is to avoid any confusion that might stem from the fact that "res judicata" is often used as the generic term for *both* branches of preclusion stemming from prior litigation (see Justice Blackmun's

opinion for the Court in *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56 (1984)). In this instance, though, the contrasting "claim preclusion" versus "issue preclusion" usage also serves to highlight the reason that Wabash Valley should prevail here on the former ground.

REA's *claim* before us is the same claim that it eschewed asserting against Wabash Valley in the original Indiana litigation between them, and that we therefore barred it from advancing on claim preclusion grounds in *Wabash I,* 903 F.2d at 455: the claim that federal law preempts the Indiana regulation because it has set too low a rate. In *Wabash I* we scotched REA's attempted use of an agency letter as the means by which it sought to preempt state law. Even though REA now seeks to place that old wine into the new bottle of a regulation, its legal *claim* of implied preemption is no different than before. REA is no more entitled to litigate that claim, having foregone the opportunity to do so in the prior litigation between the same parties, than any losing plaintiff in any other lawsuit is free to assert the same claim a second time around by developing another legal theory for holding the defendant liable.

Thus the majority opinion's parsing of REA's current argument as one "asserting the implied authority to engage in preemptive rulemaking rather than the authority to impliedly preempt" (at 1488) gives REA more than its due. That type of distinction is one without a difference for claim preclusion purposes—it is fundamental to claim preclusion, in contrast to issue preclusion, that the former bars not only every issue that *was* urged by the losing party but also every issue that *could have been* urged in support of its position (*Leal v. Krajewski*, 803

F.2d 332, 334-35 (7th Cir.1986) (applying Indiana law)). Indeed, the majority's stated distinction could readily be paraphrased to give every disgruntled litigant a second bite at the apple in another lawsuit, by the mere device of its dreaming up a fresh theory that it did not tender to the court the first time around.

Hence REA must lose on its implied preemption claim as against Wabash Valley, because it has already had its day in court and it then chose not to argue that *claim* (as we held in *Wabash I*, 903 F.2d at 455). And that leads to my second point of departure from the majority opinion, which—despite its having quoted *Arkansas Electric* and that opinion's *two* potential bases for preemption (at 1486)—then avoids any discussion of the second of those bases for the entire balance of the text (at 1488-91) that follows the res judicata discussion.

To repeat, here is the second prospect held out in *Arkansas Electric*, 461 U.S. at 389, 103 S.Ct. at 1915:

> Moreover, even without an explicit statement by the REA, a particular rate set by the [state regulatory authority] may so seriously compromise important federal interests, including the ability of the [cooperative] to repay its loans, as to be implicitly preempted by the Rural Electrification Act.

We cannot fairly gloss over such a statement by the Supreme Court by being silent about it. That language unquestionably holds out the possibility of implied preemption of state rates *without* any need to identify a specific source in the Rural Electrification Act (unlike *Arkansas Electric*'s first potential exception, which occupies the entire substantive discussion at pages 1488-91 of the majority opinion here).

To be sure, the just-quoted statement from the ultimate judicial source (though concededly via dictum) leaves all of its readers—courts, administrative agencies, lawyers—with the task of divination, a process that has occupied lesser mortals at least since the Delphic Oracle began to issue its pronouncements. And REA has now engaged in that process: It reads that language as permitting it to issue a regulation to announce the rule that it would contemplate applying in future situations where state regulatory authority has "seriously compromise[d] important federal interests, including the ability of the [cooperative] to repay its loans."

It appears from footnote 10 to the majority opinion that I may not have made the difficulty that I find with the approach taken there entirely clear. At the risk of repetition, let me summarize briefly. REA itself has not pointed to any express authority in the Rural Electrification Act for promulgation of its preemption regulation, and Judge Flaum has painstakingly and persuasively demonstrated that no such express statutory authority exists. Hence I believe that REA must seek to prevail here—if it can—only on the ground that implied preemption is available on the basis that I have just set out: that the regulation does no more than to announce the prospect of the kind of preemption held out as a possibility by the *Arkansas Electric* statement that I have quoted. And *that* argument was indeed available to REA, but was not made by it, in the earlier litigation. That was therefore a matter that *could have been* urged and determined in the first litigation—and, as already stated, that is the test for claim preclusion in Indiana (as everywhere).

In that view, it does not serve any useful purpose (and indeed I would suggest that it undercuts sound jurisprudential principles) for this Court to decide two issues that it need not resolve in order to rule against REA in light of the litigation history here:

> 1. whether the prospect of implied preemption is indeed held out as a possibility by what the Supreme Court said in *Arkansas Electric*, and
>
> 2. whether a regulation—essentially an agency's advance announcement of the existence of such a possibility and of the general principles that will govern its exercise—is an appropriate way to apprise the legal community of REA's position in those respects.

If both of those questions merit an affirmative answer, then the regulation is valid despite its lack of grounding in express statutory authorization. But those questions are better left for decision by a court in the future if, at some later date, REA were to apply that new regulation to a concrete case involving an inadequate rate approved by a state agency in the face of the preemption regulation (a *very* different situation from the one that we confront here).

Accordingly, although I agree entirely with the emptiness of REA's position in this case because it has forfeited its right to argue implied preemption against Wabash Valley, I regret that I cannot subscribe to a decision that forecloses REA from taking the Supreme Court at its word in dealing in the future with others who are not parties to this litigation, in circumstances where REA has not tied its own hands as it has against Wabash Valley. For the reasons stated here, I concur in the result reached by the majority but not in its rationale for arriving at that result.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

WABASH VALLEY POWER ASSOCIATION, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-342

UNITED STATES OF AMERICA, PETITIONER

v.

WABASH VALLEY POWER ASSOCIATION, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In opposing our petition, Wabash does not rely upon the language of the statute, its history, or the decisions of this Court. Rather, Wabash suggests that, because the court of appeals relied upon the "unique" factual circumstances in the case, this Court should deny review. Specifically, Wabash asserts that (1) the court of appeals did not create an "exception" to the absolute priority rule (Br. in Opp. 11-20), (2) the courts below properly found that the plan of reorganization maximized value to creditors (*id.* at 20-25), and (3) the Bankruptcy Code favors a policy of rehabilitation of debtors over creditors' rights to receive satisfaction of debts (*id.* at 26-28). Those arguments are unpersuasive.

1. Nowhere in its brief does Wabash quote the language of the absolute priority rule, long recognized as a "fixed principle" of reorganization law. *Northern Pac. Ry.* v. *Boyd*, 228 U.S. 482, 507 (1913). As we explain in our petition (Pet. 10-11), that rule, as codified, provides that a plan of reorganization can be confirmed as "fair and equitable" over the objection of a class of unpaid creditors *only* if

> the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

11 U.S.C. 1129(b)(2)(B)(ii). By constructively adding the word "equity" before the word "interest" in the statutory language, the court of appeals (Pet. App. 28a-30a) created an exception for entities, such as Wabash, that are organized so that the economic benefits they derive do not accrue in the form of "profits." Wabash incorrectly asserts that this construction of the statutory language by the court of appeals was "unexceptional" (Br. in Opp. 20) and that its decision is correct (*id.* at 12-13).

a. Notwithstanding the factual recitals by Wabash —most of which do not bear on either whether this Court should grant certiorari or how it should decide the narrowly framed issue on the merits—Wabash provides no support for the court of appeals' conclusion that the term "interest" in the statute is limited to "equity interest." See Br. in Opp. 12-13. As we explain in our petition (Pet. 16-17 & nn.17-18), nothing in that language, the legislative history of the Bankruptcy Code, or this Court's decisions provides a basis for limiting the term in this manner to exclude application of the absolute priority rule to entities

that are not strictly "profit"-making enterprises. Indeed, in other contexts, this Court has read the term "interest" broadly. See *Russello* v. *United States*, 464 U.S. 16, 21 (1983) ("the term 'interest' comprehends *all forms* of real and personal property, including profits and proceeds") (emphasis added). The court of appeals here had no authority to rewrite the statutory language simply because it "deem[ed] [the Code's] effects susceptible of improvement." *Badaracco* v. *Commissioner of Internal Revenue*, 464 U.S. 386, 398 (1984), citing *TVA* v. *Hill*, 437 U.S. 153, 194-195 (1978).

Contrary to Wabash's claim, the decision of the court of appeals in this case is not limited to "Wabash Valley's idiosyncratic factual and legal" circumstances. Br. in Opp. 25. Rather, the decision below is plainly predicated upon a holding that exempts *all* not-for-profit cooperative entities from the absolute priority rule. While the court made passing reference to "Wabash's cooperative structure" in discussing whether continued REMC control of Wabash violates the rule (Pet. App. 27a), its analysis is based on the nature of cooperatives generally. See *id.* at 26a-30a. As the court stated, "[c]ooperatives are designed explicitly to allow customers to receive the benefits, in the form of lower prices, which might ordinarily accrue to the owners of equity" and that "potential for lower prices is simply not an interest cognizable in bankruptcy." *Id.* at 28a. That reasoning clearly applies to *any* form of cooperative. By creating a general exception for cooperatives, the court's holding excepts from the absolute priority rule a host of Chapter 11-eligible debtors, from large rural utilities to cooperatives and not-for-profit associations in all sectors of business. Pet. 20-21 & n.19.

b. Wabash incorrectly asserts that the absolute priority rule is inapplicable here because, as a cooperative, neither it nor its members can ever "profit" in a conventional sense of receiving a return on investment or a right to share in assets upon dissolution. See, *e.g.*, Br. in Opp. 15-16. Although Wabash does not sell electricity at a "profit," its members benefit economically by Wabash's ability to purchase electricity at a reduced cost. Wabash's member-REMCs, through control of assets, share in the economic benefit of "paying lower prices for power." *Id.* at 16. Such a result violates the proscription of the absolute priority rule against a debtor retaining an "interest" in "property" when a senior creditor remains substantially unpaid. 11 U.S.C. 1129(b)(2)(B)(ii).

Moreover, even if there were a distinction between the economic benefit from selling at a profit and buying at a reduced cost, the Wabash Plan vests in the REMCs the potential for future profits through their exclusive control over Wabash's assets. Wabash's claim (Br. in Opp. 18-19) that REMC control may be distinguished here because the REMCs currently lack any incentive to restructure Wabash on a for-profit basis is unconvincing. As we have shown (Pet. 19), there is presently no *legal* impediment to Wabash transforming itself into a profit-making entity after its debt to REA is substantially discharged under its plan of reorganization, a situation that would leave the REMCs in exactly the same position as equity holders of a for-profit entity. For precisely this reason, this Court has never recognized an exception to the absolute priority rule for cooperative enterprises, but instead has upheld the absolute priority rule as a "fixed principle" for all forms of debtors. See, *e.g.*,

Northern Pac. Ry., 228 U.S. at 507; *Case* v. *Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 116 (1939); see also *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 202 (1988). The economic benefit accruing to the REMCs from their control of Wabash's assets properly falls within the term "interest" under the Code and, contrary to the decision below (Pet. App. 28a), is properly cognizable in bankruptcy.[1]

For these same reasons, the decision below directly conflicts with *Ahlers*, 485 U.S. at 207-209, and *Unruh* v. *Rushville State Bank*, 987 F.2d 1506, 1509 (10th Cir. 1993), which hold that such retained control violates the absolute priority rule. As we explain in our

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[1] Wabash also errs in arguing that the REMCs retained control through Wabash's assumption of the supply contracts rather than "on account of" a claim or interest properly subordinate to REA's claim. Br. in Opp. 13. First, the distinction is a false one. The factual predicate for Wabash's contention is a legal opinion that essentially incorporates into the supply contracts the REMCs' control of Wabash "on account of" their position as cooperative members. See Pet. App. 89a-90a, citing C/V Tr. 502, 513-21; see also Pet. App. 134a-135a. Thus, there is no distinction, for purposes of the absolute priority rule, between control "on account of" the requirements of the REMCs' supply contracts and control "on account of" the REMCs' membership interests. They are one and the same.

Second, even if the REMCs retained some contractual "right" to control Wabash after confirmation of the plan that is wholly divorced from their membership interests, such an easy evasion of the absolute priority rule would render the rule meaningless. The protection afforded creditors under the rule would be illusory if insiders could retain control post-confirmation by the simple addition of a contractual provision permitting such control. "The shareholders of *any* corporate debtor might be able to evade the absolute priority rule under [such] reasoning." *Ahlers*, 485 U.S. at 210 n.8 (emphasis added).

petition (Pet. 13 & n.13), the decision also directly conflicts with *Ahlers*' determination that no exceptions to the rule, except for possibly the "new value" exception (see Pet. 8 & n.6), survived enactment of the Bankruptcy Code in 1978. *Ahlers*, 485 U.S. at 205-206. Certiorari is warranted to resolve those conflicts.[2]

2. Wabash further relies upon fact-findings made by the courts below to argue that REA can derive no greater benefit than what is provided in the Wabash Plan because the liquidation value is less than what REA would receive under the Plan. Br. in Opp. 17-18, 20-21. That contention is both incorrect and irrelevant.

a. Notwithstanding the lower courts' fact-findings, we do not agree that liquidation is the only alternative available. Rather, Wabash could raise its rates through principles of non-traditional rate-making, which include seeking relief from regulators to raise rates for special exigent circumstances such as financial difficulty. See generally L. Gilbert, J. Olson & L. Lockett, *Prospects for Foundering Utilities: Bankruptcy, Utility Regulation and Public Policy*, 90 Com. L.J. 150, 159 (1985).[3] Indeed, in both Indiana

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[2] The only distinction Wabash can offer (Br. in Opp. 14-15) is that *Ahlers* and *Unruh* involved for-profit debtors, but that argument is foreclosed by the plain language of Section 1129(b)(2)(B)(ii), which contains no such distinction.

[3] As the appendices to the Brief in Opposition make clear, when REA "instructed Wabash to file for rate increases sufficient to assure repayment[,] Wabash complied with transparent insincerity, making it clear to the state regulators that it would be delighted if they said no." Br. in Opp. App. B5. Under the Wabash Plan, Wabash has a clear economic incentive *not* to seek an increase in rates, because its members enjoy access to low-

and Michigan (which regulates Wabash's largest member, Fruit Belt Rural Electric Cooperative), investor-owned utilities have successfully pursued non-traditional rate relief to avoid financial problems traceable to nuclear plants. See, *e.g.*, *In re Public Serv. Co. of Indiana*, 72 Pub. Util. Rep. 4th (PUR) 660 (Ind. P.S.C. Mar. 7, 1986); *In re Consumers Power Co.*, 66 Pub. Util. Rep. 4th (PUR) 1 (Mich. P.S.C. Mar. 29, 1985).[4] Wabash and its members have consistently opposed raising rates to enable it to discharge its obligations to REA. Br. in Opp. App. A17, B5. So long as the REMCs maintain control over Wabash, they are able to oppose efforts to increase rates—and thus continue to enjoy all of the economic benefits of

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cost electricity *and* avoid repaying a substantial portion of the REA debt. *Id.* at A17, B10.

[4] At least five other state commissions have granted rate relief where traditional rules governing rate-making would otherwise preclude an increase in rates and thus adversely affect bankruptcy proceedings. In one situation, the rate relief was ordered to overcome an impediment to a bankruptcy court-approved reorganization plan. See, *e.g.*, *In re Eastern Maine Elec. Coop.*, 141 Pub. Util. Rep. 4th (PUR) 456 (Me. P.U.C. Mar. 24, 1993); *In re New Hampshire Elec. Coop.*, No. DR 92-009, 1992 WL 503262 (N.H.P.U.C. Oct. 5, 1992); *In re Washington-St. Tammany Elec. Coop.*, 128 Pub. Util. Rep. 4th (PUR) 72 (La. P.S.C. July 20, 1990); *In re Northeast Utils./Public Serv. Co. of New Hampshire*, 114 Pub. Util. Rep. 4th (PUR) 385 (N.H.P.U.C. July 20, 1990), aff'd *sub nom. In re Richards*, 590 A.2d 586 (N.H.), cert. denied, 502 U.S 899 (1991). Rate relief has also been ordered to avoid driving the regulated entity into bankruptcy. See, *e.g.*, *In re Long Island Lighting Co.*, 100 Pub. Util. Rep. 4th (PUR) 237 (N.Y.P.S.C. Mar. 8, 1989); see also *In re Wolf Creek Nuclear Generating Facility*, 70 Pub. Util. Rep. 4th (PUR) 475 (Ks. S.C.C. Sept. 27, 1985) (bankruptcy would warrant consideration of additional rate increase).

cooperative membership and low-cost electricity—without enhancing Wabash's ability to repay its debt to REA. Seen in this light, the court of appeals' conclusion that "control" by the debtor is not an "interest" cognizable under the absolute priority rule creates just the anomalous result this Court has consistently rejected—that a debtor could continue to reap benefits at the expense of unpaid creditors.[5]

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[5] Contrary to Wabash's suggestion, the outcome of this case was not determined by the prior litigation between the parties noted in our petition (Pet. 4 & n.3). In *National Rural Utilities Cooperative Finance Corp.* v. *Public Service Commission of Indiana*, 552 N.E.2d 23 (1990) (*reprinted at* Br. in Opp. App. A1-A17), the Supreme Court of Indiana affirmed the denial of a rate increase to Wabash on the theory that the Marble Hill project was not "used or useful" in the production of electricity and, therefore, its construction cost could not be included in Wabash's rate base. Br. in Opp. App. A9. In *Wabash Valley Power Association* v. *REA*, 903 F.2d 445 (1990) (*reprinted at* Br. in Opp. App. B1-B25), and *Wabash Valley Power Association* v. *REA*, 988 F.2d 1480 (1993) (*reprinted at* Br. in Opp. App. C1-C30), the Seventh Circuit rejected two attempts by REA to mandate a rate increase for Wabash by means of federal preemption. In rejecting REA's initial attempt to preempt Wabash's rates on the government's first appeal, however, Judge Easterbrook's panel opinion did conclude that the "federal taxpayers have been taken to the cleaners" in this case (Br. in Opp. App. B24), and that Indiana was trying to transfer "to the federal government and to other investors (most from out of state) the cost of its adventure in nuclear power" (*id.* at B25). Principles of preemption, however, prevented REA from receiving the rate increase it sought. *Ibid.* None of those decisions either presented or foreclosed the issue raised in this case: whether the absolute priority rule is inapplicable to cooperatives and permits the REMCs to retain control of Wabash, despite the failure of the Wabash Plan to pay the government in full. Of course, the absence of an issue worthy of this Court's plenary review in prior stages of the litigation is

And even if it were incontestable that REA is "better off" under the Wabash Plan, that finding is neither relevant nor sufficient to avoid application of the absolute priority rule. As this Court stated in *Ahlers*, the determination whether creditors are "better off" if a plan "fails to provide [creditors] adequate protection or fails to honor the absolute priority rule" is "for the creditors to make in the manner specified by the Code," not the courts. 485 U.S. at 207. Thus, while the statute requires the bankruptcy court to find before confirmation that *every* Chapter 11 plan pays objecting creditors as much as or more than they would receive in liquidation, 11 U.S.C. 1129(a)(7), that finding may not substitute for compliance with the absolute priority rule, which ensures that the plan will not enable the debtor to retain an "interest" in "property" while a secured creditor remains substantially unpaid. See, *e.g.*, *In re Perez*, 30 F.3d 1209, 1213 n.3 (9th Cir. 1994). Although the court below conceded as much, Pet. App. 32a, it nonetheless failed to adhere to that statutory requirement.

3. Wabash is mistaken in asserting that the Bankruptcy Code does not permit the government to file a dispositive objection to its plan. Br. in Opp. 26-28. While the Code certainly permits a court to confirm a plan of reorganization over the objections of creditors, adherence to the absolute priority rule is a precondition of the plan being deemed "fair and equitable," and thus appropriate for confirmation. 11 U.S.C. 1129(b)(2)(B). This Court stated in *Ahlers* that a court's authority "must and can only be exer-

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no impediment to this Court reviewing the issue presented in the petition.

cised within the confines of the Bankruptcy Code," and "courts applying the [Bankruptcy] Code must effectuate [a creditor's] decision" on application of the absolute priority rule. 485 U.S. at 206-207. "[R]elief from [a debtor's] woes cannot come from a misconstruction of the applicable bankruptcy laws." *Id.* at 209. The court's failure to construe its statutory obligation properly created an easily replicable exception to the absolute priority rule that warrants this Court's review.

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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Acting Solicitor General

OCTOBER 1996